

Applicant Details

First Name **Peter**
 Last Name **Povilonis**
 Citizenship Status **U. S. Citizen**
 Email Address povilonis@uchicago.edu
 Address

Address

Street
5541 S. Everett Ave
 City
Chicago
 State/Territory
Illinois
 Zip
60540
 Country
United States

Contact Phone Number **630-818-0089**

Applicant Education

BA/BS From **University of Toronto, Canada**
 Date of BA/BS **June 2015**
 JD/LLB From **The University of Chicago Law School**

<https://www.law.uchicago.edu/>

Date of JD/LLB **June 3, 2023**

Class Rank **School does not rank**

Does the law school have a Law Review/Journal? **Yes**

Law Review/Journal **No**

Moot Court Experience **Yes**

Moot Court Name(s) **UChicago Hilton Moot Court
2021 Competition**

**UCLA 1L Moot Court 2021
Competition**

**UCLA Mock Trial 2020
Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Patton, Stephen
stephen.patton@kirkland.com
(847) 846-5405

Bradley, Curtis
bradleyca@uchicago.edu

Leiter, Brian
bleiter@uchicago.edu
773-702-0953

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Peter Povilonis

630-818-0089 • povilonis@uchicago.edu • 5541 S. Everett Ave, Chicago, IL 60637

June 10, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915

Dear Judge Walker:

I recently graduated with Honors from the University of Chicago Law School, and I have a profound interest in becoming a judicial clerk in your chambers for the 2024 term. This fall, I plan to work for a year in litigation at Kirkland & Ellis in Washington, D.C. I have a lot of friends in Virginia, and I would enjoy living in the state. I am especially interested in becoming your clerk because of your experience as an AUSA, as I aspire to become a prosecutor in the future. Working in your chambers will provide an excellent opportunity to learn from your experience, as well as generally enhance my understanding of judicial decisionmaking. By using my acute legal judgment and academic research and writing skills, I will be able to produce effective analysis beneficial to the functioning of the court.

My legal judgment has been enhanced through my work experience. For example, during my externship with District Court Judge Christina A. Snyder in the Central District of California, I researched and drafted an order on a compassionate release motion. After collaborating with the Judge and clerks, we concluded that the defendant's failure to exhaust his legal remedies precluded the Court from granting the motion—the same holding the Ninth Circuit delivered the following week. Moreover, working for the Cook County State's Attorney's Office also enhanced my legal judgment. There, I had the experience stepping up as 1st chair prosecutor for six separate misdemeanor trials. I also argued against two Motions to Suppress regarding statements made after an arrest, winning both on directed verdict by proving that there was probable cause for the officers to make a traffic stop.

Furthermore, my academic experience has strongly attuned my research and writing skills, where I have received sufficient training in analyzing complex arguments and rewriting them in succinct form. As a research assistant for Prof. Jennifer Nou, I extracted from hundreds of sources on 'subdelegation' a consistent narrative of the state of the academic literature, reporting it in a succinct, seven-page memorandum. Moreover, my background in philosophy trained me to comprehend, critique, and expand on complex jurisprudential issues. For example, at a legal philosophy conference hosted by the University of Sydney Law School, I presented a paper discussing the normative role of 'consent' in law and articulating the deficiencies of Joseph Raz's conception. Overall, I believe these experiences have prepared me to deliver high caliber work product as a judicial clerk in your chambers.

My application includes a resume; law school, undergraduate, and graduate transcripts; two writing samples; and three letters of recommendation. I look forward to the opportunity to discuss my interest and further demonstrate my qualifications. Thank you for your time and consideration.

Sincerely,

Peter Povilonis

Peter Povilonis

630-818-0089 • povilonis@uchicago.edu • 5541 S. Everett Ave, Chicago, IL 60637

Education

The University of Chicago Law School, Chicago, Illinois

J.D. with Honors, June 2023

Activities: Hilton Moot Court Board, *Vice President*
 Hilton Moot Court Competition (2021 & 2022)
 Research Assistant for Prof. Brian Leiter (Fall 2022–present)
 Research Assistant for Prof. Farah Peterson (Winter 2022)
 Research Assistant for Prof. Jennifer Nou (Fall 2021)

UCLA School of Law, Los Angeles, California

J.D. candidate 2020–2021 (transferred)

Activities: Internal Mock Trial Competition (2020), *4th Place for 1Ls, 6th overall*
 1L Moot Court Competition (2021), *Top Percentile: 75th-99th*
 Accepted onto Law Review Staff
 Criminal Justice Society & Public Defense Boot Camp

Humboldt University of Berlin, Berlin, Germany

M.A. in Philosophy with a Concentration in Practical Philosophy, November 2019

Thesis Title: *Traditional and Critical Theory: Is Horkheimer's Theory still Relevant?*

Selected Conference Presentations:

“The Reason of Non-Consent: Rethinking *Volenti Non Fit Injuria*,” Sydney, Australia, July 2019
 “Authoritarian Personality: Does Recognition Lead to Normalization?” Rome, Italy, May 2019

University of Toronto, Toronto, Canada

B.A. in Philosophy, May 2015

Honors: Dean's List Scholar, Honors with High Distinction
 Activities: *Zeitgeist* Student Journal, *Lead Editor*

Experience

Kirkland & Ellis LLP, Washington, D.C.

Associate, starting October 2023

- Return offer accepted

Summer Associate, May 2022–July 2022

- Researched and drafted memo regarding the evidentiary privileges of Attorney Generals as plaintiffs in civil suits

Cook County State's Attorney's Office, Chicago, Illinois

Law Clerk, August 2022–September 2022

- Served as acting 1st chair prosecutor for daily call sheets, six misdemeanor trials, and two Motions to Suppress
- Prepared witnesses and evidence for trial, negotiated pre-trial conferences, executed discovery requests

New Civil Liberties Alliance, Washington, D.C.

Ruth Bader Ginsburg Fellow, May 2022–July 2022

- Engaged in eight roundtable discussions and one active debate in defense of the administrative state

United States District Court for the Central District of California, Los Angeles, California

Judicial Extern for the Hon. Christina A. Snyder, June 2021–July 2021

- Individually wrote first drafts of orders given by the Judge, including a ruling on a 12(b)(6) motion and a compassionate release motion (available upon request)
- Drafted clear and succinct summaries of each incoming case for the Judge

Stone Brewing Co., Berlin, Germany

Event Planner, Brewery Coordinator, Bartender, March 2016–November 2019

- Managed orders in the brewery, oversaw can and keg fillings, translated new menus from German into English

Languages & Interests

Languages: German (fluent with *TestDaF* certification), Spanish (intermediate), French (intermediate)

Interests & Skills: Rugby, Sailing, Drums, Certified Beer Sommelier

NAME: POVILONIS, PETER
 UCLA ID: 905632828
 BIRTHDATE: 08/06/XXXX

UNIVERSITY OF CALIFORNIA, LOS ANGELES
 LAW ACADEMIC TRANSCRIPT

PAGE 1 OF 1

PROGRAM OF STUDY

ADMIT DATE: 08/24/2020
 SCHOOL OF LAW
 MAJOR: LAW

DEGREES | CERTIFICATES AWARDED

NONE AWARDED

PREVIOUS DEGREES

NONE REPORTED

CALIFORNIA RESIDENCE STATUS: NONRESIDENT

FALL SEMESTER 2020

MAJOR: LAW

INTRO LEGAL ANALYSIS	LAW 101	1.0	0.0	P
LGL RSCH & WRITING	LAW 108A	2.0	0.0	IP
MULTIPLE TERM - IN PROGRESS				
CRIMINAL LAW	LAW 120	4.0	16.0	A
TORTS	LAW 140	4.0	16.0	A
CIVIL PROCEDURE	LAW 145	4.0	13.2	B+
		<u>ATM</u>	<u>PSD</u>	<u>PTS</u> <u>GPA</u>
TERM TOTAL		13.0	13.0	45.2 3.767

SPRING SEMESTER 2021

CONTRACTS	LAW 100	4.0	16.0	A
LGL RSCH & WRITING	LAW 108B	5.0	18.5	A-
END OF MULTIPLE TERM COURSE				
PROPERTY	LAW 130	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	16.0	A
CONSTITUTNL CRISES	LAW 165	1.0	0.0	P
		<u>ATM</u>	<u>PSD</u>	<u>PTS</u> <u>GPA</u>
TERM TOTAL		18.0	18.0	65.3 3.841

LAW TOTALS

	<u>ATM</u>	<u>PSD</u>	<u>PTS</u>	<u>GPA</u>
PASS/UNSATISFACTORY TOTAL	2.0	2.0	N/A	N/A
GRADED TOTAL	29.0	29.0	N/A	N/A
CUMULATIVE TOTAL	31.0	31.0	110.5	3.810
TOTAL COMPLETED UNITS	31.0			

END OF RECORD
 NO ENTRIES BELOW THIS LINE

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Authentication
 This official transcript is printed on security paper with a blue fading background, the Seal of the UCLA Office of the Registrar, and the signature of the Senior Director of Academic Services and Registrar, Brian Hansen.



Name: Peter Povilonis

Student ID: 12338463

University of Chicago Law School

Degrees Awarded

Degree: Doctor of Law
 Confer Date: 06/03/2023
 Degree GPA: 179.676
 Degree Honors: With Honors
 J.D. in Law

Academic Program History

Program: Law School
 Start Quarter: Autumn 2021
 Current Status: Completed Program
 J.D. in Law

External Education

University of Toronto
 Toronto, Ontario Canada
 Bachelor of Arts 2015

Humboldt University
 Berlin, Germany
 Master of Arts 2019

CREDIT AWARDED FOR ACADEMIC WORK DONE AT UNIVERSITY OF CALIFORNIA AT LOS ANGELES,
 2020-2021 37

Beginning of Law School Record

			Autumn 2021		
Course	Description		Attempted	Earned	Grade
LAWS 43230	Public International Law Thomas Ginsburg		3	3	176
LAWS 46101	Administrative Law Jennifer Nou		3	3	177
LAWS 53218	Law and Public Policy: Case Studies in Problem Solving Stephen Patton		2	2	183
LAWS 63402	Workshop: Public Law and Legal Theory Sharon Fairley John Rappaport Sonja Starr Ryan Doerfler Thomas Ginsburg Hajin Kim Joshua C. Macey		0	0	P
LAWS 63612	Workshop: Constitutional Law Bridget Fahey Farah Peterson		1	1	179
			Winter 2022		
Course	Description		Attempted	Earned	Grade
LAWS 40201	Constitutional Law II: Freedom of Speech Geoffrey Stone		3	3	177
LAWS 41601	Evidence Brian Leiter		3	3	182
LAWS 47201	Criminal Procedure I: The Investigative Process Sharon Fairley		3	3	177
LAWS 63402	Workshop: Public Law and Legal Theory Sharon Fairley John Rappaport Sonja Starr Ryan Doerfler Thomas Ginsburg Hajin Kim Joshua C. Macey		1	1	P
LAWS 63612	Workshop: Constitutional Law Bridget Fahey Farah Peterson		1	1	179



Name: Peter Povilonis

Student ID: 12338463

University of Chicago Law School

Spring 2022					Spring 2023						
Course		Description	Attempted	Earned	Grade	Course		Description	Attempted	Earned	Grade
LAWS	43269	Foreign Relations Law Curtis Bradley	3	3	180	LAWS	42801	Antitrust Law Eric Posner	3	3	178
LAWS	47301	Criminal Procedure II: From Bail to Jail Sharon Fairley	3	3	181	LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	180
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	181	LAWS	43218	Public Choice and Law Saul Levmore	3	3	182
LAWS	53339	Advanced Evidence: Key Legal Principles and Their Practical Application Stephen Patton	2	2	180	LAWS	57013	Canonical Ideas in American Legal Thought Req Meets Substantial Research Paper Requirement Designation:	2	2	180
LAWS	63402	Workshop: Public Law and Legal Theory Sharon Fairley John Rappaport Sonja Starr Ryan Doerfler Thomas Ginsburg Hajin Kim Joshua C. Macey	0	0	P			William Baude Adam Chilton			
								Honors/Awards Completed Pro Bono Service Initiative			
								End of University of Chicago Law School			
LAWS	63612	Workshop: Constitutional Law Meets Substantial Research Paper Requirement Designation:	1	1	179						
		Bridget Fahey Farah Peterson									

End of University of Chicago Law School

Autumn 2022					
Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Curtis Bradley	3	3	181
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	179
LAWS	46501	Federal Criminal Law Sharon Fairley	3	3	177
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	3	3	180
LAWS	95030	Moot Court Boot Camp Rebecca Horwitz Madeline Lansky	2	2	P

Winter 2023					
Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations M. Todd Henderson	3	3	182
LAWS	53264	Advanced Legal Research Scott Vanderlin	3	3	181
LAWS	57013	Canonical Ideas in American Legal Thought William Baude Adam Chilton	2	2	180
LAWS	93499	Independent Research: Stare Decisis In Name Only	3	3	181
Req		Meets Substantial Research Paper Requirement			
Designation:		Brian Leiter			

OFFICIAL ACADEMIC DOCUMENT



Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit <http://csl.uchicago.edu/policies/disclosures>.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass (non-Law):** Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation
- Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P* High Pass
- P Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a

University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled *Pro Forma* does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website: <http://registrar.uchicago.edu>.

Revised 09/2016

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Peter Povilonis of the University of Chicago Law School class of 2023, for a judicial clerkship. I have had the privilege of teaching Peter in two seminar-type classes, where I got to know him and his academic, analytical, writing, and oral skills extremely well. He was my top student in one of those classes and one of my best students in the other. I am confident he will be a superb clerk, who will bring high intelligence, exceptional analytical and writing skills, a strong work ethic, and exemplary ethics and good judgment to your chambers. I am also confident that you will enjoy working with him and find that he is a great and supportive team member. In short, I highly recommend Peter for a clerkship, without reservation.

I have taught Peter in two classes: "Law and Public Policy: Case Studies in Problem-Solving", in the fall of 2021; and "Advanced Evidence: Key Legal Principles and Their Practical Application", in the spring of 2022. Both are "experiential" classes in which students are assigned real-life problems in which they analyze and advise clients on complex legal and policy issues (Law and Public Policy) or argue in support of or against evidentiary objections and motions in limine and conduct direct and cross examinations laying the foundation for or opposing the admissibility of various types of evidence (Advanced Evidence). Both classes are limited to 20 students, which gives me a unique opportunity to really get to know my students and their analytical and problem-solving and written and oral communication skills. This exposure and familiarity is bolstered by the fact that I use the Socratic Method extensively in both classes and that, given the small class size, every student performs a role-playing exercise and/or answers questions in almost every class. In addition, students are required to submit three written assignments in each class, in which I provide detailed comments and line edits similar to that which I have provided associates and younger partners during my 40-plus years at Kirkland.

Peter had the highest writing, class participation, and overall grade in my Law and Public Policy course last fall, and he was one of my best and top students in my Advanced Evidence class last spring. This is among a cohort of really bright and talented students in both classes. His oral comments and arguments are uniformly cogent, well-reasoned, and nuanced and insightful. And, they are consistently presented clearly and persuasively and with a natural confidence and presence. Peter is also a gifted writer. His written work product is well-organized, clear, thoroughly researched and well thought out, and both persuasive and easy to read. In short, Peter has demonstrated, consistently, in both classes, exactly the skills I have looked for in young lawyers during my four decades in private practice and that I think will make him an excellent clerk.

Peter started his law school career at UCLA, before transferring to the University of Chicago last fall, at the beginning of his second year. He finished his first year at UCLA at or near the top of his class, and participated in its mock trial competition, in which he competed as a 1L against 2L's and 3L's and finished sixth overall. During the summer after his first year (2021), Peter served as a judicial extern for District Judge Christina Snyder of the U.S. District Court for the Central District of California. In that role, Peter drafted several orders and decisions, including rulings on motions to dismiss and for compassionate release. He also reviewed and drafted "jurisdiction reports" and summaries for approximately 20 newly filed cases, which analyzed whether the Court had subject matter jurisdiction and provided a summary of the claims asserted. He also had an opportunity to observe a lengthy and highly publicized criminal trial. Peter thoroughly enjoyed his experience as an extern and I think it was a major contributor to his desire to become a clerk.

Upon transferring to the University of Chicago last fall, Peter hit the ground running and has not let up. Last fall, he participated in the Law School's Hinton Moot Court competition, which is a highly competitive and rigorous competition that involves intensive training and feedback with respect to both brief writing and oral argument. Given the added work involved, only a relatively small percentage of students elect to participate. I mention this because I think Peter's participation is a further example of the training he has received, and his commitment to developing the skills that will make him a first-rate clerk.

Peter has also completed two stints as a research assistant for Law School faculty members. From July 2021 through September 2021, Peter completed an exhaustive research project for Professor Jennifer Nou, in which he reviewed more than 500 sources concerning governmental agencies' "sub-delegation" of their regulatory and other administrative authority to other governmental entities, for a law review article Professor Nou is writing. Last January and February, Peter also completed a major research project for Professor Farah Peterson. That project involved an exhaustive historical analysis of modern cases in which courts have decided claims alleging political violence by White nationalist or Black civil rights protesters and organizations for an article Professor Peterson is writing, which was recently accepted for publication in the Columbia Law Review. Once again, I believe this experience demonstrates the training and skills Peter has worked hard to develop and that will further ensure his success and value as an intern.

Stephen Patton - stephen.patton@kirkland.com - (847) 846-5405

Finally, Peter recently completed a successful summer working at Kirkland's Washington, D.C. office as a summer associate, where he was highly regarded and received an offer of full-time employment.

In summary, I believe that Peter will be an outstanding clerk and I highly recommend him to you. He has a keen intellect and excellent analytical skills. He is a terrific writer. And, he is extremely enthusiastic, hard-working, and conscientious. I am also confident that you will find him to be collegial and easy to work with, and a solid, dependable, and collaborative team member.

Please feel free to call or write if you have questions or would like to discuss Peter in real time. You can reach me at stephen.patton@kirkland.com or 312-862-3501.

Sincerely,

Steve Patton

Stephen Patton - stephen.patton@kirkland.com - (847) 846-5405

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Peter Povilonis for a clerkship with you. Peter has been a student in two of my classes—Foreign Relations Law (Spring 2022), and Federal Courts (Autumn 2022). He did very well in both classes, scoring each time in the top 10% of the group. His class participation was also excellent.

Peter and I have often talked outside of class, so I have a good sense of his interests and abilities. He is extremely smart and thoughtful and is also very curious about the law. In my office hours, he would often ask me hard questions that went beyond the materials simply because he was interested in knowing more. He also listens well, which is not always true of the brightest students. My discussions with him feel like genuine conversations.

Peter transferred to us from UCLA, where he had done very well his first year. Transferring is always a challenge and sometimes limits the opportunities that a student has at the new school, but he has managed to thrive here. While he has not participated on the law review, he has participated in other law school activities such as moot court, and he has worked as a research assistant to several professors. These activities, importantly, have given him additional writing experience. He has also used his summers well. Among other things, he has done a summer externship with a federal district court judge in California and has worked as a summer associate at Kirkland & Ellis, where he will be starting as an associate in the Fall.

Finally, Peter has an interesting background. His grandparents were Lithuanian refugees to Canada during World War II, and his parents grew up in Canada. Although his parents eventually moved to the United States, Peter did his undergraduate work at the University of Toronto. After that, he moved to Germany in order to learn German and study philosophy, and he also ended up working there for several years in a brewery. These international experiences give Peter a maturity and depth that distinguishes him from some of his classmates. Personally, I've really enjoyed getting to know him.

For all of these reasons, I strongly recommend him.

Sincerely,

Curtis A. Bradley

Curtis Bradley - bradleyca@uchicago.edu

Professor Brian Leiter
Karl N. Llewellyn Professor of Jurisprudence
Director, Center for Law, Philosophy and Human Values
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
bleiter@uchicago.edu | 773-702-0953

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write in enthusiastic support of Peter Povilonis, who has applied for a clerkship in your chambers. He will be an excellent clerk.

I have had Mr. Povilonis in two very different classes: Evidence and Jurisprudence. In my Winter 2022 class on Evidence, he received a grade of 182 on the three-hour multiple-choice exam which--on our rather complicated grading scheme--is a very solid A grade (180 starts the A range, and we rarely give grades higher than 184). The highest grade in the class was 184, and Mr. Povilonis's score puts him in the top 12% of a class with 88 students. Mr. Povilonis was also a regular in my office hours that quarter, and he always came well-prepared with detailed questions about the rules or the cases we had read. As office hours made clear, he is a very mature, serious and attentive student, and so I was pleased but not surprised by how well he did on the exam.

In Spring 2022, Mr. Povilonis took my introductory class on Jurisprudence. This class covers a range of issues in and around the theory of adjudication, the theory of how judges do decide cases and how they ought to decide them. The readings are drawn from O.W. Holmes, Karl Llewellyn, H.L.A. Hart, Ronald Dworkin, and Joseph Raz, among other important jurisprudential writers; the emphasis throughout is on detailed, critical analysis of the arguments advanced. The exam (an 8-hour take-home essay exam, with a strict word limit, so concision and organization are important) asked students to discuss how Hart, Dworkin and a contemporary natural law theorist, Mark Murphy, would answer the "age old question" (as Raz formulated it) "whether it is ever the case that a rule is a rule of law because it is morally binding, and whether a rule can ever fail to be legally binding on the ground that it is morally unacceptable." Mr. Povilonis wrote a crisp, precise and very good answer, picking up on nuances of the views of each author relevant to the question. He received a grade of 181, putting him in the top 7 of 33 students; only two students wrote clearly better exams (and one of those had a PhD in philosophy). Mr. Povilonis was also one of the three or four most lively and interesting participants in class discussion.

This academic year (2022-23), I have hired Mr. Povilonis as my primary research assistant (RA), based on the strong work he did for me in two different classes, as well as his background in philosophy and his excellent language skills (especially his near-fluency in German). He has been a really outstanding RA: careful, intelligent, and very helpful with some tricky translation questions raised by some German texts I am working with. Even with the most mundane tasks (like cite checks), his work has been precise and wholly reliable.

I also asked Mr. Povilonis for some writing samples. He gave me two pieces of writing. The first was what seemed to me a nicely done and informative literature review on empirical work related to subdelegation within federal agencies that he did for my colleague Professor Jennifer Nou, a leading expert on administrative law (who is currently serving in the Biden Administration). The second was a more jurisprudential piece examining different accounts by law professors and philosophers of how it is that "consent" can transform the legal status of an action (e.g., consenting to sexual intercourse means it is not rape). The latter was a very impressive and sophisticated piece of writing: lucid, subtle and interesting in its criticisms of the existing views in the literature. Mr. Povilonis is very interested in an academic career, and this paper on consent and issues in criminal law theory confirms that he is more than qualified to succeed in that career if he wants it.

His overall record since transferring to Chicago appears on track to be at least in the top third of the class and to graduate with honors (177 is the median grade, honors starts around 179 most years). Based on the work he has done for me, however, I would rank him more highly, more like the top 10-15% of the class. He certainly compares very favorably to prior students I have recommended who secured federal appellate and other demanding clerkships.

Mr. Povilonis gave me an enthusiastic report about all he learned from his judicial internship after his first year of law school, both about procedure and substantive legal issues. As a result, he is very eager to do a clerkship after graduating. He will bring to a clerkship an attractive combination of nuts-and-bolts knowledge, intellectual ambition, and very strong writing skills. On the evidence of all the work he has done for me and that I have read by him, I am confident Mr. Povilonis will be an excellent clerk, as well as a congenial presence in your chambers.

Sincerely yours,

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Writing Sample 1

The following writing sample includes excerpts from an essay I wrote for Constitutional Law Workshop, which I will be submitting for publication in the near future. I argue that the Court cannot simultaneously uphold and change the law without diminishing the policy justifications of stare decisis. I developed the thesis entirely on my own, although I did benefit from later discussion about the essay in the Workshop. Excerpted sections are noted with asterisks, and I removed multiple footnotes from the original piece for a smoother, quicker read.

STARE DECISIS IN NAME ONLY

Peter Povilonis

TABLE OF CONTENTS

INTRODUCTION	1
I. STARE DECISIS	5
II. <i>KISOR</i> V. <i>WILKIE</i>	6
A. <i>Genuine Ambiguity Requirement</i>	6
B. <i>Reasonableness Requirement</i>	8
C. <i>Implications on Stare Decisis</i>	8
III. THE AFTERMATH OF <i>KISOR</i>	12
IV. CONCLUSION	12

INTRODUCTION

Given the current composition of the Supreme Court—a majority of which has shown a willingness to overturn precedent¹—the doctrine of stare decisis has reemerged as a major subject of scholarly discussion.² The Court has been particularly vocal about the administrative state, with many Justices demonstrating eagerness to pull back on administrative law doctrines.³ Some of these doctrines have long pedigrees, which means that overruling precedent could undercut reliance interests or increase costs of judicial resources. Rather than formally overruling existing doctrine,⁴ the Roberts Court has used a host of strategies to limit the administrative law cannon,

¹ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)); *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

² See, e.g., Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 119 (2020) (“As other scholars have noted, ‘the U.S. Supreme Court has become unusually preoccupied with issues of precedent’ since its recent shift in composition.”) (quoting Richard M. Re, *Precedent As Permission*, 99 TEX. L. REV. 907 (2021)).

³ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131–2148 (2019) (Gorsuch, J., dissenting).

⁴ See Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL’Y 733, 738 (2020) (explaining how the Chief Justice “exhibit[s] a reticence to overrule precedent”).

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 2

from invoking the major questions doctrine⁵ to turning exceptions into the rule.⁶ The Court's reluctance to overrule cases outright comes from a recognition that overturning precedent could have drastic consequences.⁷ And yet, *upholding* precedent can have equally grave consequences when stare decisis is applied incorrectly. This essay will discuss the consequences of a misapplication of stare decisis.

Stare decisis is “the doctrine that courts will adhere to precedent in making their decisions.”⁸ Although there are many versions of stare decisis, this essay will focus on the Supreme Court's doctrine of stare decisis as applied to *erroneous* precedent. Following precedent—even erroneous precedent—ensures the “stability of law,” the principle on which stare decisis is grounded.⁹ Maintaining the stability of law can proffer many policy benefits, such as preserving reliance interests, promoting judicial efficiency, or maintaining the Court's “perceived legitimacy.”¹⁰ Even if the Court finds a previous decision to be “erroneous,” the Court will often weigh the value of stare decisis's benefits to determine if the previous decision should nevertheless be upheld.¹¹

In situations where the Court openly asserts that a previous decision is “erroneous” but nevertheless upholds the decision, the merits of this “erroneous” law cannot be the reason why the Court decided to uphold. Instead, the Court upholds an erroneous decision *only* because of its resulting policy benefits.¹² Still, “stare decisis is not an end in itself;”¹³ it is only valuable for the benefits it provides. Thus, “if circumstances arose where certainty was not served by stare decisis, or where countervailing advantages

⁵ See, e.g., *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022).

⁶ See *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (2020).

⁷ *Dobbs*, 142 S.Ct. at 2311 (Roberts, C.J., concurring) (arguing for “judicial restraint” to avoid the “dramatic and consequential” effects of overruling).

⁸ *Stare Decisis*, LEGAL INFORMATION INSTITUTE (Dec. 2021), https://www.law.cornell.edu/wex/stare_decisis.

⁹ Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 89, 91 (Goldstein, ed. 1987) (“Stability is indeed an important concern in support of a principle of precedent.”).

¹⁰ See Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 68–80 (2018) (explaining the different justifications for stare decisis).

¹¹ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

¹² See *id.*

¹³ *Id.*

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 3

could reasonably be preferred, blind adherence to binding precedent could not be justified.”¹⁴

One strategy the Court has implemented to avoid formally overruling past cases is what this essay calls “stare decisis in name only.” When invoking stare decisis in name only, the Court claims to uphold a previous decision but nevertheless modifies the rule announced by that previous decision. For example, the Court might supplement the previous rule with a new test, or create exceptions and limitations to the rule. In doing so, the Court changes the law—despite claiming otherwise. In the administrative law context, the Court has deployed stare decisis in name only to limit existing doctrine while simultaneously “proclaiming that no change is underway.”¹⁵

If stare decisis is justified on stability of law grounds, stare decisis in name only threatens that very stability. When the Court alters long-settled law through stare decisis in name only, it “undermine[s] the rule-of-law values that justify stare decisis in the first place.”¹⁶ For example, people who were relying on the previous decision must adapt their behavior to a new decision, lower courts may face new litigation concerning the scope of the new law, and the Court’s legitimacy is potentially undermined by its presentation of two contradictory holdings. Stare decisis in name only creates more uncertainty than either completely upholding or expressly overruling: Can those previously relying on the old rule still assume it is upheld? Are lower courts supposed to follow the Court’s word or new rule? Is the Court perceived as fair and legitimate if it claims one thing but holds another?

In order for the Court to gain the full benefit of stare decisis, it may not subversively change the law. The Court must either uphold a previous decision in its entirety or be clear about what is overruled. The middle ground approach of stare decisis in name only—where the Court attempts to simultaneously uphold and limit—creates the very same uncertainty that stare decisis is meant to avoid. This essay will explore the issue through *Kisor v. Wilkie*,¹⁷ where the Court purported to apply stare decisis yet simultaneously changed the underlying law.

Kisor is a 2019 case in which the Court purported to uphold *Auer* deference¹⁸—judicial deference to an agency’s interpretation of its own

¹⁴ Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 73, 86 (Goldstein, ed. 1987) (emphasis removed).

¹⁵ William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949).

¹⁶ *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

¹⁷ 139 S.Ct. 2400 (2019).

¹⁸ *Auer v. Robbins*, 519 U.S. 452 (1997).

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 4

regulations.¹⁹ *Auer* deference, sometimes called *Seminole Rock* deference,²⁰ has a long judicial history—far longer than *Chevron* deference—and cases applying *Auer/Seminole Rock* deference are “legion.”²¹ However, the Court did not simply uphold *Auer*; it also changed the original rule of deference as applied by the long line of cases in the *Seminole Rock* canon. *Kisor* listed several new requirements that an agency must meet in order to merit judicial deference.²² For example, one new requirement is that the Court only provides deference to an agency’s interpretation if the regulation is “genuinely ambiguous.”²³ Previous courts applying *Auer* deference, however, often deferred to the agency’s interpretation *without* making any determinations as to whether the regulation was genuinely ambiguous.²⁴ Instead of expressly overruling these cases applying *Auer* that do not satisfy the new requirements for agency deference, the Court purported to uphold *Auer*’s “longstanding doctrine.”²⁵

Kisor’s application of stare decisis undermines the very reasons for invoking the stare decisis in the first place: *Kisor* destabilizes the law, requires the lower courts to draft all new case law, and creates uncertainty around whether an agency’s previous reliance on *Auer* will still fall within *Kisor*’s new limitations. By not authentically upholding—nor expressly overruling—a preexisting rule, the Court creates a false sense of security for those who previously relied on past decisions and might not realize that the state of the law has actually changed.

This essay represents an immanent critique of *Kisor* and will be focused on exemplifying problems with one of the Court’s tactics to limit administrative law—stare decisis in name only. This essay will not critique the merits of *Auer* or *Kisor* deference. Rather, it argues that when the Court invokes stare decisis but simultaneously makes changes to the rule being upheld, the Court hollows out many policy benefits of stare decisis—the whole reason to apply the doctrine. The depletion of policy justifications is especially problematic in *Kisor* because stare decisis was the only basis on which the Court could form a coalition to uphold *Auer*. Thus, by creating uncertainty in the law, the *Kisor* Court negates its only justification for upholding the case. Although *Kisor* proclaims “stare decisis,” it is but stare decisis in name only.

¹⁹ *Kisor*, 139 S.Ct. at 2408.

²⁰ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

²¹ *See Kisor*, 139 S.Ct. at 2412 n.3 (citing sixteen Supreme Court cases applying *Auer* deference).

²² *Id.* at 2415–18.

²³ *Id.* at 2415.

²⁴ *See supra* Part II.A.

²⁵ *Id.* at 2408.

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 5

Kisor's use of stare decisis in name only is more than a semantic quibble; the decision has already had taxing effects. Post-*Kisor*, lower courts must decide whether previous decisions in the *Auer/Seminole Rock* canon are still good law—i.e., whether they fall within the scope of *Kisor*'s new rule). For example, one previous decision in the *Seminole Rock* canon, *Stinson v. United States*,²⁶ held that a court must provide *Auer* deference to an agency's interpretation of unambiguous provisions—directly contrary to *Kisor*'s new “genuinely ambiguous” requirement.²⁷ It would seem, therefore, that *Stinson* is no longer good law, because it clearly falls outside the scope of *Kisor*'s genuinely ambiguous requirement. Yet the *Kisor* Court claimed to uphold the “longstanding doctrine” dating back to *Seminole Rock*.²⁸ Is *Stinson* overruled?

The question of whether *Kisor* overruled *Stinson* has now led to a new circuit split. While circuit splits are great fodder for student notes,²⁹ they are anathema to the stability of law. Such confusion and creation of circuit splits is not expected when the Court simply upholds precedent. There should be no need to expend judicial resources to determine the scope of a law following a decision based on stare decisis. Rather, a circuit split might be expected from a case which *overturns* precedent, one which creates uncertainty in the law. Therefore, if the Court decides to uphold its past decisions, then it needs to authentically uphold them—with the erroneous rule the previous decisions affirmed. Alternatively, if the Court thinks a doctrine should be overruled or limited, then the Court needs to be clear that it is expressly overruling or limiting the doctrine. If the Court “overrule[s] expressly[,] [s]tare decisis then is not used to breed the uncertainty which it is supposed to dispel.”³⁰

I. STARE DECISIS

[Redacted]

²⁶ 508 U.S. 36 (1993).

²⁷ *Id.* at 44–45; *Kisor*, 139 S.Ct. at 2415.

²⁸ *Kisor*, 139 S.Ct. at 2408.

²⁹ See, e.g., Note, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 HARV. J.L. & PUB. POL'Y 349, 350 (2022)

³⁰ Douglas, *supra* note 15, at 749 (emphasis removed).

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 6

II. *KISOR* V. *WILKIE*

* * *

Prior to *Kisor*, the *Auer* doctrine was widely understood to grant broad deference to agencies interpreting their own regulations—broader than *Chevron* deference to agencies interpreting their enabling statutes.³¹ However, the *Kisor* Court decided to equate the two standards, drawing on analogies from the limitations on *Chevron* deference.³² In doing so, the Court acknowledges that it is “somewhat expand[ing] on”³³ or “further[ing]”³⁴ *Auer* deference. This is clear from two new requirements the Court imposes on *Auer* deference.

A. *Genuine Ambiguity Requirement*

One area where the *Kisor* Court “somewhat expand[ed] on” the limitations for *Auer* deference is the “genuinely ambiguous” requirement.³⁵ The Kagan opinion, joined here by Chief Justice Roberts to form a majority, explains that “[f]irst and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous.”³⁶ For those familiar with *Chevron* deference, this may sound familiar—a court should defer to an agency’s interpretation of its enabling statute when the language is ambiguous.³⁷ Pre-*Kisor*, however, deference under *Auer* or *Seminole Rock* did not require “genuine ambiguity.”³⁸ Indeed, *Seminole Rock* held that “the ultimate criterion is the agency’s interpretation” which “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”³⁹

³¹ See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (“When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.”); *U.S. v. Cinemark USA, Inc.*, 348 F.3d 569, 578 (6th Cir. 2003) (“When an agency is interpreting its own regulations, even greater deference is due to the agency’s interpretation.”).

³² *Kisor*, 139 S.Ct. at 2416.

³³ *Id.* at 2414.

³⁴ *Id.* at 2408.

³⁵ *Id.* at 2415.

³⁶ *Id.*

³⁷ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

³⁸ Interestingly, a pre-*Kisor* article presciently argues that the *Seminole Rock* standard *should* be changed to align with *Chevron*. See Kevin O. Leske, *Between Seminole Rock and A Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 275 (2013).

³⁹ *Seminole Rock*, 325 U.S. at 414.

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 7

Throughout *Auer*'s long history, the Court has remarked on—and made decisions based on—the fact that *Auer* deference does not require the interpreted regulation to be ambiguous. For example, in *U.S. v. Larionoff*,⁴⁰ the Court cited *Seminole Rock*'s rule to hold that the Court “need not tarry . . . over the various ambiguous terms and complex interrelations of the regulations.”⁴¹ More still, in *Stinson v. United States*,⁴² the Court held that the Commentary to the Sentencing Guidelines should be treated as an agency’s interpretation of its own legislative rule and is given “controlling weight,”⁴³ even when the provision was not ambiguous.⁴⁴ The *Kisor* Court openly admits that “this Court has applied *Auer* deference without significant analysis of the underlying regulation.”⁴⁵ Thus, the Court recognized that under traditional *Auer* deference, whether the language of the regulation being interpreted was “genuinely ambiguous” was typically of little concern.⁴⁶ Yet in *Kisor*, where the Court purportedly upholds *Auer* deference using stare decisis, the Court establishes a previously unknown “genuinely ambiguous” requirement.

To establish that a regulation is “genuinely ambiguous,” an agency must do more than show it is merely “ambiguous.”⁴⁷ That is, *Kisor* now requires a court to “exhaust all the ‘traditional tools’ of construction.”⁴⁸ This is a high standard, one the Court proclaims is “not quite so tame” as before.⁴⁹ Exhausting a court’s “traditional tools” means that “hard interpretive conundrums, even relating to complex rules, can often be solved.”⁵⁰ Surprisingly, the citation the *Kisor* Court gives in support of the exhaustion requirement is *Chevron*, with no citations from an *Auer* deference case.⁵¹ The traditional *Seminole Rock* rule—especially as developed in subsequent cases—did not require such an exhaustive construction effort.⁵² Notwithstanding, the *Kisor* Court cites to a *Chevron* deference case to

⁴⁰ 431 U.S. 864 (1977).

⁴¹ *U.S. v. Larionoff*, 431 U.S. 864, 872 (1977).

⁴² 508 U.S. 36 (1993).

⁴³ *Id.* at 45 (citing *Seminole Rock*, 325 U.S. at 414).

⁴⁴ *See id.* at 44 (“[C]ommentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.”).

⁴⁵ *Kisor*, 139 S.Ct. at 2414.

⁴⁶ *See id.*; but see *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (holding that a provision must be at least “ambiguous” to merit *Auer* deference).

⁴⁷ *See Kisor*, 139 S.Ct. at 2414–15.

⁴⁸ *Id.* at 2415.

⁴⁹ *Id.* at 2418.

⁵⁰ *Kisor*, 139 S.Ct. at 2414.

⁵¹ *See Kisor*, 139 S.Ct. at 2415. The entire paragraph explaining the exhaustion requirement cites only *Chevron* and *Chevron* deference cases. *See id.*

⁵² *See, e.g., United States v. Larionoff*, 431 U.S. 864, 872 (1977).

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 8

support its statement that a court “must ‘carefully consider’ the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.”⁵³ In direct contrast, the Court in *Seminole Rock* stated, “[o]ur *only* tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.”⁵⁴ Furthermore, lower courts pre-*Kisor* would not have understood “genuine ambiguity” as a prerequisite to affording *Auer* deference—lower courts post-*Kisor* have already remarked on how *Kisor*’s “genuinely ambiguous” requirement restricted the doctrine.⁵⁵

* * *

B. Reasonableness Requirement

[Redacted]

C. Implications on Stare Decisis

As discussed above, *Kisor* clearly altered the traditional *Auer* doctrine. Viewed in isolation, correcting a doctrine believed to be erroneous is a normal—and perhaps essential—function of the Supreme Court. So, why fret about *Kisor* giving *Auer* deference bite, which may well be good policy? The problem is that the Court claimed to be upholding the *Auer* canon, yet it simultaneously limited the rule of deference found in those cases. *Kisor* was supposedly a case of simple stare decisis, not one addressing the merits of *Auer*. In reality, *Kisor* was neither a simple case of stare decisis, nor an explicit reevaluation of *Auer*. As such, stare decisis in name only has created uncertainty about whether the aspects of the old doctrine now limited by *Kisor*’s new rule—like deference to unambiguous regulations—are still good law.

⁵³ *Id.* (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) (*Chevron* deference case)).

⁵⁴ *Seminole Rock*, 325 U.S. at 414 (emphasis added).

⁵⁵ See *United States v. Nasir*, 17 F.4th 459, 471 (3rd Cir. 2021) (“In *Kisor*, the Court cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous.”); *United States v. Moses*, 23 F.4th 347, 348 (4th Cir. 2022) (“[*Kisor*] limited controlling deference to an executive agency’s reasonable interpretation of its own regulations to where ‘the regulation is *genuinely ambiguous*.’”) (emphasis added by *Moses* court).

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 9

Moreover, “expand[ing]” or “further[ing]” the doctrine is beyond the “lone question presented,”⁵⁶ which was “whether we should abandon the longstanding doctrine.”⁵⁷ Consequentially, the Court rids this “longstanding doctrine” of many of its defining features. Indeed, under the previous doctrine, deference had been applied to interpretations of unambiguous regulations, but in *Kisor*, the Court abandoned this rule in favor of a *Chevron*-like “genuinely ambiguous” requirement.⁵⁸ Further, *Auer*’s plainly erroneous standard was also restricted in favor of *Chevron*’s reasonableness standard.⁵⁹

If the reasonableness and genuinely ambiguous requirements are new limits added to the doctrine by *Kisor*, then what exactly did the Court uphold? Broadly speaking, “deference” to an agency’s interpretation of its own regulations remains. Yet with *Kisor*’s new requirements, it is not the same deference of the “longstanding doctrine” the Court purports to uphold. In fact, the Court “corrected” *Auer* deference so much that in the end, the Court’s new limitations were strikingly similar to the view of Justice Gorsuch’s concurrence, which voted to overrule *Auer*. As Chief Justice Roberts explained, “the distance between the majority and Justice Gorsuch is not as great as it may initially appear.”⁶⁰ Why? Because “initially,” one opinion claims to uphold *Auer* deference while the other states it should be overruled. Yet, if we were to cut out the Court’s statements about upholding *Auer*,⁶¹ the Court’s opinion would look like an opinion designed to overrule *Auer* deference—exactly what the Gorsuch concurrence wanted.⁶² As one scholar noted, “[i]f ambiguity were understood in this sense, the American system of judicial review would operate exactly the same as if we jettisoned *Auer* deference.”⁶³ Ironical, as this means that *Kisor* has deviated from *Auer* so much that it looks the same as an opinion that is voting to overrule *Auer*. Although some form of agency deference may still be intact, the rule has

⁵⁶ *Kisor*, 139 S.Ct. at 2418.

⁵⁷ *Id.* at 2408.

⁵⁸ *See supra* Part II.A.

⁵⁹ *See supra* Part II.B.

⁶⁰ *Kisor*, 139 S.Ct. at 2424 (Roberts, C.J., concurring).

⁶¹ Or as Chief Justice Roberts says, “[a]ccounting for variations in verbal formulation . . .” *Id.*

⁶² *See id.* at 2448 (Kavanaugh, J., concurring) (“If a reviewing court employs all the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency’s contrary interpretation.”).

⁶³ Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 188 (2019).

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 10

been altered. Whatever is being “upheld” is no longer *Auer* deference—*Kisor* deference is now the law.

Certainly, if, in the Court’s view, the new limitations are better, then the Court has the capacity to correct the doctrine—and it should probably do so. Further, if the policy justifications behind stare decisis do not outweigh the need to fix an erroneous old rule, then the old rule should be overruled, even if only in part. Alternatively, if the Court wants to uphold its past decisions, then it should uphold them—erroneous rule and all. But the *Kisor* Court tried to have their cake and eat it too. The Court tried to secure the benefit of stare decisis while at the same time fixing its past decision. “Stare decisis is a doctrine of preservation, not transformation”⁶⁴—changing the law prevents stare decisis from preserving the very policy justifications behind the doctrine.

Moreover, the *Kisor* Court cannot *uphold* an element of the test that does not even appear in past decisions. The Court “expand[ing]” or “further[ing]” the doctrine is problematic because the previous cases in the *Auer* canon where deference was given were *not* decided by applying *Kisor*’s test.⁶⁵ Thus, the question becomes: which of the old cases would still be given deference under *Kisor*—i.e., how much of the old canon is still good law?

The *Kisor* Court’s stare decisis strategy only complicates the determination of whether pre-*Kisor* decisions are good law. Indeed, the Court claims to uphold “those decisions.”⁶⁶ Which decisions? All of “those decisions”?⁶⁷ If all prior decisions are upheld, then what should a lower court do about the new test *Kisor* provided, which is clearly at odds with some past decisions? Or, alternatively, should a court only uphold “those decisions” that adhere to *Kisor*’s new test? But then, what does a court make of *Kisor* purporting to uphold the “longstanding doctrine”? Furthermore, how do we know which cases are upheld and which ones are overruled? Pre-*Kisor*, courts did not always evaluate a regulation for genuine ambiguity or reasonable interpretations, since it was not a required part of the doctrine. Courts certainly did not exhaust all the “traditional tools of construction.”

Take a pre-*Kisor* decision like *United States v. Larionoff*,⁶⁸ where the Court granted *Auer* deference to the Navy’s interpretation of various Department of Defense regulations.⁶⁹ Here, the *Larionoff* Court found that

⁶⁴ *Citizens United*, 558 U.S. 384 (Roberts, C.J., concurring).

⁶⁵ See, e.g., *United States v. Larionoff*, 431 U.S. 864, 872 (1977).

⁶⁶ *Kisor*, 139 S.Ct. at 2408.

⁶⁷ See *Kisor*, 139 S.Ct. at 2422 (“*Kisor* asks us to overrule not a single case, but a ‘long line of precedents’—each one reaffirming the rest and going back 75 years or more.”).

⁶⁸ 431 U.S. 864 (1977).

⁶⁹ *Id.* at 872.

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 11

the regulations “contain a number of ambiguities.”⁷⁰ Despite “argu[ments] that these regulations, *read together*, establish” an unambiguous meaning,⁷¹ the *Larionoff* Court found it “need not tarry, however, over . . . complex interrelations of the regulations.”⁷² Hence, the Court granted *Auer* deference to the Navy’s interpretation because it was not “plainly erroneous.”⁷³

Although *Larionoff* applied *Auer* deference, it is not obvious it could have granted *Kisor* deference. The *Larionoff* Court found “ambiguities”—but were these “genuine ambiguities” in the sense *Kisor* requisites? Under *Kisor*, “a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”⁷⁴ Genuine ambiguity requires a court to “carefully consider the text, structure, history, and purpose of a regulation”⁷⁵—which the *Larionoff* Court explicitly declined to do.⁷⁶ If the *Larionoff* Court had “read together” the regulations as a whole, as *Kisor* requires, perhaps the regulations would not be ambiguous.

Should lower courts be reexamining similar pre-*Kisor* decisions? The Supreme Court “has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times.”⁷⁷ Some of these previous decisions may have involved interpretations of genuinely ambiguous provisions, but not every case did (in fact, *Stinson* explicitly upheld an unambiguous provision).⁷⁸ If a litigant challenges an agency interpretation that received *Auer* deference in a previous decision, is a court now obligated to undertake a *Kisor* analysis, or can the court dismiss the claim under previously established case law?

Engaging in reexamination of pre-*Kisor* decisions would seem odd considering that *Kisor* claimed to “uphold” those decisions. Normally, reexamining previous decisions would occur after a decision that overruled, not upheld, case law. As explained below, reexamining previous decisions requires expending judicial resources, something stare decisis is supposed to avoid. Uncertainty over which decisions are upheld and which, if any, are overruled exacerbates the problem by making it difficult for lower courts to determine which pre-*Kisor* decisions should still be preserved. Without this certainty, the policy justifications that would have otherwise come from upholding the law are diminished, leaving stare decisis in a mostly hollowed out form.

⁷⁰ *Id.*

⁷¹ *Id.* (emphasis added).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Kisor*, 139 S.Ct. at 2415.

⁷⁵ *Id.* (citations omitted).

⁷⁶ See *Larionoff*, 431 U.S. at 872.

⁷⁷ *Kisor*, 139 S.Ct. at 2422.

⁷⁸ *Stinson*, 508 U.S. at 44–45

STARE DECISIS IN NAME ONLY | PETER POVILONIS | 12

III. THE AFTERMATH OF *KISOR*

[Redacted]

IV. CONCLUSION

Stare decisis, as outlined in this essay, is a post-merits doctrine grounded on the stability of law. This stability is justified only through its policy benefits, but changing the law undermines that stability—which, in turn, undermines the policy justification. By purporting to uphold the law yet simultaneously limiting it, *Kisor* destabilized the law, thereby failing to gain the policy benefits of stability.

It should raise some eyebrows when a case that merely “upholds” precedent somehow engenders a circuit split. But the tragic part is that the circuit split is about the *same* question—the “lone” and “only question”—*Kisor* was supposed to answer: *whether Kisor overruled its precedent*. So not only did the Court forfeit most of the benefit of stare decisis, the Court did not even answer the only question it was posed. Indeed, some circuits held that *Kisor* *did* overrule its precedent. Thus, in the end, *Kisor* presents a paradox: a case that was meant to uphold precedent, has overruled precedent. As the *Kisor* Court writes, “[i]t is the rare overruling that introduces so much instability into so many areas of law, all in one blow.”⁷⁹ But it is the rare upholding that introduces even more instability, all in the guise of “stare decisis.”

Thus, the Court must make a decision: overrule the case, promulgating a better legal rule but sacrificing other policy interests; or uphold the case, obtaining the policy justifications but affirming an erroneous legal rule. The Court cannot have it both ways.

⁷⁹ *Kisor*, 139 S.Ct. at 2422.

Peter Povilonis

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Writing Sample 2

The following writing sample is a draft of an order ruling on defendant’s motion to dismiss, which I wrote during my summer 2021 externship with District Court Judge Christine A. Snyder. Apart from the section entitled “III. LEGAL STANDARD,” this work represents my own authentic writing after discussion of ideas with the Judge and clerks.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

Present: The Honorable	CHRISTINA A. SNYDER
-------------------------------	---------------------

CATHERINE JEANG

Not Present

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: DEFENDANT’S MOTION TO DISMISS FIRST AMENDED COMPLAINT (Dkt. [12], filed June 15, 2021)

I. INTRODUCTION

This diversity action concerns a contract dispute over payment alleged to be due for aircraft component parts sold pursuant to two purchase orders issued in 2016 and 2018.

On April 14, 2021, plaintiff Weber Metals, Inc. filed this action against defendant HM Dunn Company, Inc. Dkt. 1 (“Compl.”). On June 1, 2021, plaintiff filed the operative first amended complaint, asserting claims for: (1) breach of contract, pursuant to Cal. Com. Code § 2709(b); (2) quantum meruit; (3) account stated; (4) open book account. See dkt. 11 (“FAC”).

On June 15, 2021, defendant filed the instant motion to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6), dkt. 12 (“Mot.”), concurrently with a request for judicial notice. Dkt. 13 (“RJN”). On June 28, 2021, plaintiff filed an opposition to the motion, dkt. 15 (“Opp.”), along with its own request for judicial notice. Dkt. 17. Defendant filed a reply on July 2, 2021. Dkt. 18 (“Reply”).

Having carefully considered the parties’ arguments, the Court finds and concludes as follows.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

II. BACKGROUND

Plaintiff alleges the following facts in the FAC.

A. The Parties

Plaintiff is a California forging company with its principal place of business in Paramount, California. Plaintiff forges metal components for use in aerospace applications, including aircraft. FAC ¶¶ 1, 5.

Defendant is a Delaware corporation with its principal place of business in Kansas. Id. ¶ 2. Defendant is a machining company that manufactures finished components for use in aerospace applications, including aircraft. Id. ¶ 5.

B. The Purchase Orders

According to the FAC, defendant hired plaintiff to forge metals to certain specifications to be used in components manufactured for Spirit Aerosystem (“Spirit”). Id. ¶ 6. Defendant issued the first purchase order from Missouri on or about September 21, 2016, for 135 units with a total price of \$653,127.30. Id. ¶ 7; dkt. 11-1, Ex. A. Defendant issued a second purchase order from Kansas on or about March 14, 2018, for 92 units with a total price of \$445,094.16. Id. ¶ 8; dkt. 11-2, Ex. B. Under the terms of the purchase orders, plaintiff’s performance was to be concluded upon completion of the forging of units and notification to defendant that the units are ready for pick up. FAC ¶ 9. According to the FAC, defendant was responsible for picking up the units from both purchase orders upon notification from the plaintiff’s place of business within 30 days of notice. Id. Plaintiff completed the forging of all units requested on each of the purchase orders on October 9, 2018, and notified defendant that they were ready for pick up. Id.

Upon notification, defendant received and paid for only some of the units but refused to pick up 110 units from the first purchase order and 27 units from the second purchase order. Id. ¶¶ 10–11. Plaintiff alleges that defendant never claimed any of the custom-made units were defective and did not timely notify plaintiff of cancellation of the purchase orders. Id. ¶ 10. Defendant refused to pick up and pay for those units within 30 days of notification because, according to defendant, Spirit no longer needed those units. Id. Sometime in December 2018, plaintiff demanded payment of the outstanding balance of

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

\$662,803.26, plus interest. Id. ¶¶ 11–12. In response, defendant’s representative John Betzen performed a unit count at plaintiff’s facility to verify the number of units manufactured. Id. ¶ 12. Betzen confirmed that plaintiff would be paid the amount owed for the units confirmed by Betzen, and, in February 2019, requested that plaintiff create an invoice for payment, which plaintiff did. Id. Thereafter, Betzen left defendant’s employ, and the invoice was not paid. Id.

The FAC further alleges that defendant assigned another representative to take over the account and assured plaintiff that defendant was working with Spirit to resolve the dispute between defendant and Spirit. Defendant’s negotiations with Spirit took place over the next several months. Id. ¶ 13. Afterwards, defendant informed plaintiff “as early as January 2020” that the dispute with Spirit was resolved, but defendant did not pay the invoice. Id. In February 2020, plaintiff submitted another invoice to defendant. Id. Plaintiff followed up with defendant in November 2020, and had numerous discussions about payment of the amount owed with defendant through December 2020. Id. ¶ 14. During those discussions, defendant never told plaintiff that defendant believed there to be a one-year statute of limitations on plaintiff’s claims. Id. Instead, defendant represented that it would be unable to pay plaintiff until defendant received payment from Spirit. Id. According to the FAC, defendant did not dispute that it owed plaintiff payment for the units, but instead disputed only the total number of units for which payment was owed. Id. ¶ 14–15. Plaintiff thereafter submitted a second invoice to defendant on December 2, 2020, reducing the total number of units to 137 and the amount owed to \$662,803.26. Id. As of filing this action on April 14, 2021, defendant had not paid plaintiff this amount. Id. ¶ 24.

III. LEGAL STANDARD

A motion pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if “there is a ‘lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.’” Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988)). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level.” Id. (internal citations omitted).

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Spewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (“[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”). Ultimately, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont’l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev’d on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when “the court determines that the allegation of other facts consistent with the challenged pleading

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

could not possibly cure the deficiency.” Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

IV. DISCUSSION

A. Judicial Notice

“Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint.” Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). However, Federal Rule of Evidence 201 empowers a court to take judicial notice of facts that are either “(1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); Mullis v. U. S. Bankr. Court for Dist. of Nevada, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987). In other words, “[i]f the documents are not physically attached to the complaint, they may be considered if the documents’ ‘authenticity . . . is not contested’ and ‘the plaintiff’s complaint necessarily relies’ on them.” Lee, 250 F.3d at 688.

Defendant requests that the Court take judicial notice of a document entitled “HM Dunn Aerosystems Purchasing Terms and Conditions” (Exhibit 1). According to defendant, Exhibit 1 can be found on defendant’s website, and it allegedly sets forth the terms and conditions of its purchase orders. Defendant states that the purchase orders attached to the FAC refer to Exhibit 1 in fine print as follows: “Quality Clauses and Terms & Conditions apply. Documents available on Supplier Portal at <http://www.hmdunn.com>.” Mot. at 8; see RJN. Defendant contends that even though plaintiff does not refer to these terms and conditions in the FAC, the purchase orders incorporate these terms and conditions through the reference to defendant’s website on the purchase orders. Id. at 3. Accordingly, the purchase orders would be subject to the terms of Exhibit 1, which contain a limitations provision restricting action on any claim against defendant to within one year after the cause of action has accrued. Mot. at 11–12; RJN at 14. If the breach of contract occurred in November 2018, plaintiff filed this action approximately two and a half years after the claims for relief accrued. Mot. at 6. Defendant therefore argues that plaintiff’s claims based on the purchase orders are time-barred by the one-year limitations period set

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

forth in the terms and conditions contained in Exhibit 1. Id. at 12. As such, defendant contends that the FAC should be dismissed for failure to state a claim upon which relief can be granted. Id.

In opposition, plaintiff challenges the authenticity of Exhibit 1, arguing that there is nothing in the document that confirms that Exhibit 1 sets forth the same terms and conditions that were in existence and referred to in the first purchase order issued in 2016 and the second purchase order issued in 2018. Opp. at 5. In addition, plaintiff argues that it never signed or agreed to the terms and conditions in Exhibit 1, which contains a signature line that is left blank. Id.; RJN at 16. According to plaintiff, the FAC does not reference or otherwise incorporate Exhibit 1. Opp. at 4; see generally FAC.

In response to plaintiff's challenge to Exhibit 1's authenticity, defendant points to the date listed in a subparagraph on the second page of Exhibit 1, which states, "(August 2013 version 1)." Reply at 3; RJN at 5.

At this preliminary stage, the Court cannot conclude as a matter of law that the terms and conditions set forth in Exhibit 1 are part of the parties' agreements as alleged in the complaint. For one, defendant has not established that Exhibit 1 sets forth the terms and conditions referred to in the purchase orders. While the same URL appears in both purchase orders, the URL alone is insufficient to demonstrate that the website (to which the URL refers) contained the same terms and conditions in 2016 and 2018. There is nothing contained in Exhibit 1 that confirms that the terms and conditions defendant now puts forward are the same terms and conditions referenced by the purchase orders. Defendant's contention that Exhibit 1 is the 2013 version of the terms and conditions does not establish it is the same version that was available on defendant's website in 2016 and 2018. Furthermore, regardless of whether Exhibit 1 sets forth the terms and conditions that were in existence in 2016 and 2018, the parties dispute whether the purchase orders are subject to the terms and conditions stated by Exhibit 1. For instance, plaintiff contends that it did not agree to the terms and conditions as stated on defendant's website.

Therefore, because the terms and conditions in existence during 2016 and 2018 are the subject of a factual dispute, the terms and conditions set forth in Exhibit 1 are not properly the subject of judicial notice. Moreover, even if there were no factual dispute as

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

to what terms and conditions were in existence in 2016 and 2018, the Court could not conclude at this stage of the proceedings that the limitation provision would bind plaintiff. This is so because plaintiff may have a variety of contractual defenses as to whether it can be bound by the terms and conditions as stated on defendant's website.

Therefore, because there are factual disputes regarding the authenticity of Exhibit 1, as well as the terms and conditions the parties agreed to, the Court cannot conclude that Exhibit 1 is incorporated by reference into the FAC. As such, the Court is unable to determine whether the limitation provision in Exhibit 1 would bind plaintiff, including with respect to any contractual defenses plaintiff may raise. Accordingly, the Court declines to take judicial notice of Exhibit 1.¹ See JL v. Weber, No. 17-cv-0006-CAB (WVG), 2017 WL 2959286, at *3 (S.D. Cal. July 11, 2017) (declining to take judicial notice because plaintiff challenged the authenticity of the document).

Accordingly, defendant's request for judicial notice is **DENIED**.

B. Statute of Limitations

Defendant moves to dismiss only on the ground that plaintiff's claims are barred by the statute of limitations. See Mot. Plaintiff opposes, arguing that each of its claims are timely. See Opp.

1. Novation

As an initial matter, based on plaintiff's allegations in the FAC, it appears to the Court that the invoice plaintiff submitted to defendant on December 2, 2020 seeking a reduced amount of \$662,803.26 may possibly constitute a novation of the parties' contracts. To the extent that such a novation occurred on December 2, 2020, each of plaintiff's claims have been timely asserted, even assuming *arguendo* that a one-year

¹ Plaintiff has also submitted a request for judicial notice of three COVID-19 emergency orders that toll the statute of limitations. As the motion to dismiss is denied on other grounds, this request is **DENIED as moot**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

limitations period applies. The Court requests that the parties address this issue at oral argument.

2. State Law

Plaintiff argues, apart from the limitations period set forth in Exhibit 1, that each of the purchase orders is subject to the statutory limitations periods prescribed by the relevant state law. Plaintiff argues that California law applies; defendant argues that Kansas and Missouri law applies. Id.; Mot. at 10.

Although the parties dispute which states' laws apply, all of the potentially applicable state statutes of limitations provide for at least a four-year limitations period for claims for breach of a written contract. In California, an action on any written contract is subject to a four-year statute of limitations period, pursuant to Cal. Civ. Proc. § 337(1). Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co., 116 Cal.App.4th 1375, 421 (2004). In Kansas, the statute of limitations period for action upon any agreement in writing is five years, pursuant to Kan. Stat. Ann. § 60-511(1). Law v. Law Co. Bldg. Assocs., 295 Kan. 551, 566, 1075 (2012). Likewise, in Missouri, all general actions upon contracts are subject to a five-year statute of limitations period, pursuant to Mo. Ann. Stat. § 516.120(1). DiGregorio Food Prods. v. Racanelli, 609 S.W.3d 478, 480 (Mo. 2020).

Here, plaintiff has pled the existence of an agreement between the parties formed by the purchase orders. According to the FAC, plaintiff completed its performance in October 2018, upon creating the units and notifying defendant the units were ready for pick up. FAC ¶ 9. Plaintiff alleges that defendant was obligated to pay plaintiff for these units within 30 days of notice, but defendant did not pick up or pay for all the units within 30 days. Id. ¶ 10–11. As such, plaintiff alleges that the breach of contract occurred at the earliest in November 2018, which is approximately two and one-half years from the date of filing this action. Therefore, the Court finds that under each state's potentially applicable statute of limitations, plaintiff has alleged facts sufficient to support its claim for breach of contract.

Accordingly, because plaintiff's claims are timely under every potentially applicable state statute of limitations, the motion to dismiss is **DENIED**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

V. CONCLUSION

In accordance with the foregoing, the Court orders as follows:

- 1. The Court **DENIES** defendant’s request for judicial notice.
- 2. The Court **DENIES** defendant’s motion to dismiss.

IT IS SO ORDERED.

Initials of
Preparer

Applicant Details

First Name	Johnna
Last Name	Purcell
Citizenship Status	U. S. Citizen
Email Address	jfp93@cornell.edu
Address	<div> Address Street 910 M St NW, 802 City Washington State/Territory District of Columbia Zip 20001 Country United States </div>
Contact Phone Number	7248126257

Applicant Education

BA/BS From	Pennsylvania State University- University Park
Date of BA/BS	May 2018
JD/LLB From	Cornell Law School http://www.lawschool.cornell.edu
Date of JD/LLB	May 30, 2021
Class Rank	30%
Law Review/Journal	Yes
Journal(s)	Cornell Journal of Law and Public Policy
Moot Court Experience	Yes
Moot Court Name(s)	Cornell Law Internal Moot Court

Bar Admission

Admission(s)	District of Columbia
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Prior Judicial Experience

Judicial Internships/
Externships **No**
Post-graduate Judicial Law
Clerk **No**

Specialized Work Experience

Recommenders

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607-255-5423

Goldberg, Rachel
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Wesley, Richard
Rcw64@cornell.edu
5852437910

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Johnna Purcell
910 M Street NW, Unit 802
Washington DC, 20001

April 19, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA

Dear Judge Walker,

My name is Johnna Purcell and I am writing to apply for a clerkship in your chambers for your 2024 term or any term thereafter. I am a 2021 graduate of Cornell Law School. Currently, I am an Associate at Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. At Pillsbury, my practice is varied and includes matters related to public policy, regulatory compliance, white collar litigation, and government investigations. While at Pillsbury, I have had the opportunity to assist with several government investigations and white collar criminal defense matters. My exposure to these issues has bolstered my interest in pursuing a career in government service as a trial attorney. I hope that clerking for a district court will provide for further exposure to the complex legal issues trial attorneys regularly work on, as well as the opportunity to observe and learn from the judges and lawyers practicing in the court.

As a current resident of Washington, D.C. and native of Southwestern Pennsylvania, I have a special interest in clerking in the Eastern District of Virginia and plan to practice in either Washington, D.C. or Virginia long-term.

A resume, law school transcript, and writing sample are enclosed. Cornell Law School will separately forward you three letters of recommendation: (1) from US Court of Appeals for the Second Circuit Judge Richard C. Wesley and Professor John Blume, (2) from Professor Aziz Rana, and (3) from Professor Rachel Goldberg.

Please do not hesitate to contact me should you have any questions or need any additional information. Thank you for your consideration.

Sincerely,

Johnna Purcell

Johnna Purcell

910 M Street NW, Unit 802, Washington, D.C., 20001 | 724-812-6257 | jfp93@cornell.edu

EDUCATION:

Cornell Law School	Ithaca, NY
J.D., Concentration in Public Law, <i>cum laude</i>	May 2021
<i>GPA:</i>	3.66
<i>Honors:</i>	CALI Excellence for the Future Award for Citizenship and American Constitutional Thought, Spring 2020; Professional Development Orientation Fellow, Fall 2020; Dean's List: Fall 2019 and Fall 2020.
<i>Journal:</i>	Senior Editorial Board (Membership Director) of Volume 30 of the Cornell Journal of Law and Public Policy
<i>Moot Court:</i>	Executive Bench Editor for the Cornell Law School Moot Court Board, 2020–21; Second Place Brief in 2019 Cuccia Moot Court Competition; Two Time Top 16 Finisher in Moot Court Competitions.
<i>Activities:</i>	Chair of the Public Interest Law Union's Annual 2020 Cabaret Event; President of Society of Wine and Jurisprudence, 2019-2020 school year; Semi-Finalist in the 2021 Internal Mock Trial Competition
<i>Publications:</i>	Johnna Purcell, Note, <i>A Switch in Time to Destroy Nine</i> , 30 CORNELL J. L. PUB. POL'Y 611 (Spring 2020).

The Schreyer Honors College at the Pennsylvania State University	University Park, PA
BA, Political Science and Global and International Studies, <i>magna cum laude</i>	May 2018
<i>Honors:</i>	Student Marshal for Department of Global and International Studies' 2018 Graduating Class
<i>Thesis:</i>	<i>Comprehensive Sexual Education Policy and Public Health Outcomes</i>
<i>Activities:</i>	College Democrats: Pennsylvania Central Vice President and Penn State Executive Vice President; Student Government: At-Large Representative and Associate Justice of the Judicial Board.
<i>Publications:</i>	Nichola Gutgold and Johnna Purcell, <i>I'm in and I'm in to Win: The 2008 and 2016 Internet Announcement Videos of Hillary Clinton for President</i> , 9 MEDIA STUDIES 17 (Aug. 23, 2018); Nichola Gutgold and Johnna Purcell, <i>Why can't Hillary connect with young voters?</i> , PENN LIVE (Feb. 21, 2016).

RELEVANT EXPERIENCE:

Pillsbury Winthrop Shaw Pittman, LLP	Washington, D.C
Associate	October 2021 - Present
Summer Associate	June 2020 - August 2020
<ul style="list-style-type: none"> Assists in performing federal government relations, lobbying, and advocacy for a variety of clients including cybersecurity technology developers, universities, municipalities, and critical infrastructure providers. Represents clients to develop and file applications with the Department of Homeland Security to receive anti-terrorism technology liability protections through the SAFETY Act. Conducts legislative research and drafts federal legislation on behalf of clients in the education, professional certification, financial services, national defense, and critical infrastructure sectors. Supports the White Collar Litigation and Government Investigations teams on several investigations and a pending trial by conducting legal research, assisting in discovery and fact development, drafting motions, and supporting efforts to prepare clients for interviews with prosecutors. 	

Cornell Law Lawyering Program**Ithaca, NY**

Legal Writing Honors Fellow

August 2019 – May 2020

- Selected by the first legal writing program to serve as an Honors Fellow at the end of first year of law school based on academic and legal writing ability and aptitude for working with other students.
- Assisted in instructing first year legal writing students by providing written critiques on assignments, holding office hours and conferences with students to discuss legal writing techniques, and supervising student oral arguments and presentations.

Pennsylvania Governor's Office of General Counsel**Harrisburg, PA**

Legal Extern | Office of Chief Counsel for the Department of State

May 2019 - August 2019

- Supported lawyers that represent the Secretary of the Commonwealth in areas relating to elections, professional licenses, corporate registration, and the State Athletic Commission.
- Conducted legal and legislative research for election law attorneys on issues including the campaign finance provisions of the Pennsylvania Election Code, constitutional and statutory regulations for ballot referendums, and requirements for absentee ballots.
- Assisted in reviewing petitions and drafting decisions in administrative adjudications on behalf of the Secretary of State regarding notary licensure discipline.

Marc Friedenberg for Congress**State College, PA**

Volunteer Operations Coordinator

January 2018 - May 2018

Campaign Manager

May 2018 - September 2018

- Worked, as a paid campaign staffer, to coordinate over fifty volunteers in the execution of a comprehensive "get out the vote" strategy during the 2018 PA Democratic Primary, resulting in a victory in a highly-competitive election.
- Created and executed field, media, messaging, and fundraising strategies for the general election.
- Managed a team of three paid staff members, a fifteen-member campaign committee, and ten interns.

The Democratic National Committee**Washington, D.C.**

Operations Intern

May 2017 - August 2017

- Coordinated directly with the DNC's Chief Operating Officer and Operations Director on daily tasks and special projects crucial to the DNC's day-to-day operations.

United States Senate | Office of Senator Robert P. Casey Jr.**Washington, D.C.**

Legislative Intern | Healthcare and Children's Policy Area.

May 2016 - July 2016

- Drafted four letters to constituents about pending legislation and three memos on congressional hearings.
- Conducted legislative research projects on issues including the Affordable Care Act and sexual education policy.

ADDITIONAL EXPERIENCE:**Frank Lloyd Wright's Fallingwater****Mill Run, PA**

Visitor Service Representative

May 2014 – June 2017

- Worked as a seasonal employee in the Visitor Services Department at the museum and grounds of world-renowned American architect Frank Lloyd Wright's Fallingwater.

INTERESTS:

Baking, running, wine tasting, Penn State football.

Cornell Law School - Grade Report - 12/13/2022

Johnna F Purcell

JD, Class of 2021

Course	Title	Instructor(s)	Credits	Grade			
Fall 2018 (8/21/2018 - 12/17/2018)							
LAW 5001.2	Civil Procedure	Clermont	3.0	A			
LAW 5021.4	Constitutional Law	Rana	4.0	A-			
LAW 5041.3	Contracts	Rachlinski	4.0	B+			
LAW 5081.6	Lawyering	Goldberg	2.0	A-			
LAW 5121.2	Property	Sherwin	3.0	B+			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.5831
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.5831

Spring 2019 (1/15/2019 - 5/14/2019)

LAW 5001.2	Civil Procedure	Gardner	3.0	B			
LAW 5061.2	Criminal Law	Margulies	3.0	A-			
LAW 5081.6	Lawyering	Goldberg	2.0	A-			
LAW 5151.3	Torts	Siliciano	3.0	A			
LAW 6401.1	Evidence	Weyble	3.0	A-			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	14.0	14.0	3.5971
Cumulative	30.0	30.0	30.0	30.0	30.0	30.0	3.5896

Fall 2019 (8/27/2019 - 12/23/2019)

LAW 6011.1	Administrative Law	Macey	3.0	B+			
LAW 6881.650	Supervised Writing/Teaching Honors Fellow Program	Mooney	2.0	SX			
LAW 6921.1	Trial Advocacy	Weyble	5.0	A-			
LAW 7052.101	Adv. Per. Writing and Oral Advocacy	Bryan	3.0	A			
LAW 7923.301	Protest and Civil Disobedience Defense Practicum 1	Gibson	4.0	A			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	17.0	17.0	17.0	17.0	15.0	15.0	3.7560
Cumulative	47.0	47.0	47.0	47.0	45.0	45.0	3.6451

^ Dean's List

Spring 2020 (1/21/2020 - 5/8/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 6340.1	Energy Law	Macey	3.0	SX			
LAW 6441.1	Federal Income Taxation	Elkins	3.0	SX			
LAW 6871.607	Supervised Writing	Lyon	2.0	SX			
LAW 6881.650	Supervised Writing/Teaching Honors Fellow Program	Goldberg	2.0	SX			
LAW 7283.101	Citizenship in American Constitutional Thought	Rana	3.0	SX	CALI		
PE 1545.1	Beginning Figure Skating	Essigmann	0.0	SX			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	0.0	0.0	N/A
Cumulative	60.0	60.0	60.0	60.0	45.0	45.0	3.6451

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A-			
LAW 6641.1	Professional Responsibility	Wendel	3.0	A-			
LAW 7260.101	Federal Appellate Practice	Blume/Wesley	4.0	SX			
LAW 7924.301	Protest and Civil Disobedience Defense Practicum 2	Gibson	4.0	A			
	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	10.0	10.0	3.8020
Cumulative	74.0	74.0	74.0	74.0	55.0	55.0	3.6736

^ Dean's List

12/13/22, 2:12 PM

Grade Reports

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6070.1	Federal Policy Making	Simonetta	1.0	SX
LAW 6361.1	Environmental Law	Rachlinski	3.0	A-
LAW 6431.1	Federal Courts	Dorf	4.0	B+
LAW 7691.101	Money Talks: Amping Up Political Speech Under the First Amendment	Danks Burke	3.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	11.0	11.0	11.0	11.0	10.0	10.0	3.6330
Cumulative	85.0	85.0	85.0	85.0	65.0	65.0	3.6673

Total Hours Earned: 85

Received JD cum laude on 05/30/2021



Cornell Law School

April 24, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I very enthusiastically recommend Johnna Purcell for a judicial clerkship. She is incredibly intelligent, intellectually curious, and very hardworking. I have no doubt that she would be a wonderful asset to your office.

In the fall of 2018, I was Johnna's professor for Constitutional Law, a four credit lecture course that is required for all first year law students at Cornell. In a class of 65, Johnna was among the very best students in the course and received a grade of A-. Given the grading standards and rigor of the course, this was no small accomplishment. There were only two flat As and if I were not constrained by our curve, Johnna would have received an A as well. I also interacted with her extensively inside and outside of the classroom. In all these interactions, I was struck by her genuine passion for the material and her legal knowledge more generally. She was always meticulously prepared for class. I could count on her to interject her own thoughtful point of view: one grounded in the assigned case or text. In my efforts to facilitate discussion, I was especially appreciative of her role in the course. Johnna was very comfortable in Socratic questioning and had a natural skill in articulating nuanced and complex positions. Given the number of hot button topics we discussed, her ability to avoid polemics and to tease out doctrinal tensions was also quite impressive. Indeed, Johnna's classmates clearly seemed to appreciate her interventions and general calm demeanor, something that is not always the case with the very strongest students.

She brought the same analytical precision and creativity to her written work. If anything, her exam highlighted to me Johnna's talent for legal research and writing. The exam combined doctrinal questions about the Fourteenth Amendment's sex equality jurisprudence with open-ended thematic questions about judicial review, constitutional structure, and rights protection. The argumentation, organizational structure, and writing style were all excellent. Moreover, her responses were imbued with Johnna's own approach to the material – one that combined a clear perspective with subtlety and awareness of competing views.



The Honorable Jamar K. Walker
 April 24, 2023
 Page 2

In the spring of 2020, Johnna took another one of my courses, titled “Citizenship in American Constitutional Thought.” The class is a three credit seminar that covers issues of immigration, race, and gender in the law of citizenship. It is a rigorous upper-level assessment of these topics with a heavy workload and set of requirements. These include extensive readings in case law, American history, and political philosophy, as well as weekly response papers and a final paper (25-40 pages).

That semester was interrupted by the covid-19 pandemic and our grades, as at most of our peer law schools, were moved to a mandatory pass/fail. But even with all this disruption, Johnna performance remained excellent. Indeed, she was the most outstanding student in the course (out of 16 students). She received the CALI Award and if I were giving grades she would have gotten an A. As with Constitutional Law, I could rely on her to help me shape the conversation. She always read carefully for class and came prepared with comments that pushed our discussion intellectually. And as before, her writing – both in the response papers and in her final paper – was outstanding.

The goal of the final paper was to produce a piece that could be published eventually as legal scholarship. In my view, Johnna’s essay was both incredibly original and showed clear publication potential. The paper was a sustained exploration of the law and history of voter registration and election administration in the United States. In the process, she focused on the role going forward of courts and legislatures in solidifying constitutional democracy. Along with being incredibly prescient, what made it a particularly successful piece of scholarship was Johnna’s ability to stitch together rich doctrinal analysis with arguments grounded in history and constitutional theory, an impressive achievement in general – all the more so given that she was a second-year law student. I very much hope she considers pursuing publication at some point, and also continues with this line of scholarly research. Her performance in both classes makes evident to me that, if interested, Johnna would be a terrific future legal academic. It also underscores that she has the research and writing skills to be an exceptionally strong judicial clerk.

Outside of class, it was exciting to see Johnna develop as a leader on campus. She excelled in moot court and mock trial and took on leadership roles in various organizations including the Public Interest Law Union and the Moot Court Board. In keeping with her interest in constitutional structure she also wrote a terrific note for the Cornell Journal of Law and Public Policy on judicial reform.

Johnna came to law school with a background in electoral politics. And it was wonderful to see her deepen her knowledge and perspective during her time at Cornell. Similarly, I have been very excited to see her work after graduation at the intersection of law and government, as an Associate Public Policy Attorney at Pillsbury Winthrop Shaw Pitman. Simply put, she is exactly the type of student that makes teaching law especially rewarding. It has been a pleasure to get to know her. She is among the very best students that I have taught in thirteen years as a professor, at Cornell and also as a visiting professor at both Harvard and Yale Law Schools.



The Honorable Jamar K. Walker

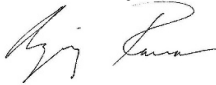
April 24, 2023

Page 3

All this leads me to believe that a clerkship would be a perfect fit for her. Due to her thoughtfulness, enthusiasm for the law, and evident skill in legal research and writing, I have no doubt that Johnna would be a great addition to your office and again has my very enthusiastic recommendation.

Please feel free to contact me by e-mail at ar643@cornell.edu or by phone at 203-606-9465 if you have any additional questions.

Sincerely,



Aziz Rana
Richard and Lois Cole Professor of Law
Cornell Law School





Cornell Law School

Rachel T. Goldberg

Associate Clinical Professor of Law
Director, Appellate Criminal Defense Clinic
 Myron Taylor Hall
 Ithaca, New York 14853
 P: 607.255-0183 / F: 607.255.7193
 E: rtg67@cornell.edu

April 24, 2023

The Honorable Jamar K. Walker
 United States District Court
 For the Eastern District of Virginia
 Walter E. Hoffman United States Courthouse
 600 Granby Street
 Norfolk, VA 23510-1915

Dear Judge Walker:

I write with enthusiasm to recommend Johnna Purcell for a judicial clerkship in your chambers. In 2018-19 Johnna was a first-year student in my year-long Lawyering course, and I selected her to serve as a teaching assistant for that course in 2019-20. I got to know Johnna well, and I believe that her writing and research skills, professionalism, and work experience will make her an excellent clerk.

I first got to know Johnna as my student in Lawyering, which is Cornell's traditional first-year legal research and writing class; during the fall semester of Lawyering, students write open- and closed-universe predictive memos and perform a simulated oral presentation to a supervisor; during the spring semester, students write and revise a persuasive brief and conduct a simulated pretrial oral argument. Johnna met with me often to discuss her assignments. She seemed genuinely interested in discussing both the mechanics and rhetorical effects of legal-writing choices. Her final paper fall semester—on an issue related to the intersection of art and privacy law—was among the best in the class. During spring semester, in both her written work and in-person meetings, Johnna demonstrated she understood the law, accurately described it, and properly applied it to the facts in question. I was also always happy to see Johnna's hand raised in class, because I could count on her to answer difficult questions correctly, with both sincerity and good humor.

Because Johnna was not only a strong writer and researcher but also a likeable and highly-motivated self-starter, I encouraged her to apply to be a teaching assistant ("Honors Fellow") for Lawyering during her 2L year. Honors Fellows help critique student papers, mentor and support students during one-on-one conferences and office hours, and teach classes on grammar, style, and *Bluebook* issues. Throughout the year, Johnna's critiques of student work were consistently strong, and I trusted her to make accurate and insightful stylistic and substantive suggestions. The year presented another challenge that Johnna met with her typical mix of competence and positivity: our abrupt transition to online learning because of the COVID-19 pandemic. Johnna helped me redesign lesson plans for our new learning environment, anticipated student concerns and anxieties, and helped formulate responses to those concerns.

The work that Johnna performed as an Honors Fellow helps demonstrate that she will have no problem undertaking the large workload of a judicial clerkship. She exhibited both

teamwork and leadership skills in effectively cooperating and communicating with me and the other three Honors Fellows, and in mentoring our students.

Johnna's work as an Associate Public Policy Attorney at Pillsbury Winthrop Shaw Pitman LLP has allowed her to hone skills that will make her a highly successful clerk. She regularly drafts legislative language, regulatory compliance attestations and applications, and legal memoranda. Given the small size of her practice group, she receives targeted feedback directly from partners. She also takes on work that more senior associates usually do, such as developing and drafting client proposals and preparing clients for meetings with the federal government. She is directly responsible for managing her time and does not require much oversight to successfully execute a project. Her work and office environment have prepared Johnna to cooperate directly with her co-clerks, work independently on many assignments at once, and maturely communicate with colleagues and litigants.

Finally, I should note that enjoyed working with Johnna. She is a genuinely friendly and nice person who is very easy to approach and collaborate with on work-related projects. She is always excited to embrace a new challenge, no matter how daunting it seems. I believe that Johnna will be a wonderful judicial clerk and I have every confidence that he will successfully manage all of the responsibilities of the position.

If you have any questions about my recommendation, please feel free to email me at rtg67@cornell.edu.

Sincerely,



Rachel T. Goldberg, J.D., Ph.D.
Associate Clinical Professor of Law



UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

RICHARD C. WESLEY
UNITED STATES CIRCUIT JUDGE

585-243-7910
FAX 585-243-7915

April 24, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: *Johnna Purcell*

Dear Judge Walker:

We are pleased to offer this joint letter of recommendation on behalf of Johnna Purcell, who has applied to your chambers for an elbow clerk position. We jointly teach a class at Cornell Law entitled Federal Appellate Practice. It is a small seminar (12 students) with a very rigorous curriculum. The students argue two cases off the SCOTUS docket, with the final case being argued before an Article III panel of district and circuit judges. In addition, they write a limited issue memo—usually a bail issue—and a full-length merits brief. This is a class of highly motivated students; over the ten years that we have taught this class close to 75% of the students have secured judicial clerkships. Professor Blume has the added perspective of having taught Johnna Criminal Procedure Adjudications, which we will discuss later in the letter.

First, the bottom line: Johnna has all the skills to be a terrific clerk. She writes well—her brief was one of the best in class. She is an exceptionally self-motivated young lawyer. Johnna has managed a campaign for a seat in Congress, authored a note that was published in one of Cornell's journals, been an active participant in student life at Penn State and Cornell, and excelled academically at both institutions.

There is one aspect of Johnna's resume that says a great deal about her and what she would bring to your chambers. During her 2L year, Johnna served as an Honors Fellow for the First Year Legal Writing Seminar. Honors Fellows are selected by their 1L instructors in the Writing Seminar to act as TAs for the following year. They are selected based on their academic performance, their maturity, and most importantly, their ability to work collaboratively with 1Ls coming to grips with "thinking and writing like a lawyer." In our experience as a Judge (now 35 years) and Professor of Law (now 26 years) we have found that Honors Fellows have been excellent clerks. Judges that regularly hire Cornell students look for the Honors Fellow entry on a candidate's resume. We

LIVINGSTON COUNTY GOVERNMENT CENTER
6 COURT STREET
GENESEO, NEW YORK 14454-1030

The Honorable Jamar K. Walker
April 24, 2023
Page 2

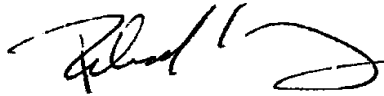
know based on Johnna's performance in class and how she has conducted herself at Cornell that she would be a joy to have in chambers.

At the time Johnna took our class, the nation was in the throes of the COVID nightmare. All of Johnna's classes were conducted remotely, as were her two arguments. This added stress did not deter Johnna. In her final argument, she did an excellent job before the panel, despite a rash of "technical" difficulties during the final round. She also demonstrated an ability to work well collaboratively, as she had a co-counsel for her arguments and the brief writing assignment.

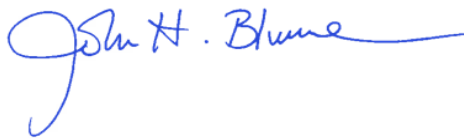
In Criminal Procedure Adjudications (taken the same semester), Johnna was an excellent student. She was always "in" class (it was hybrid, with students alternating between Zoom and in-person), took part frequently (but not obnoxiously), and when she did her comments, they were always well-thought-out and on point. Additionally, Johnna did a very competent job on the final examination. She earned an "A-" in the class and just barely missed the cutoff for an "A".

Because of her excellent legal research and writing skills, rigorous intellect, and her ability to work well with others, we both enthusiastically endorse Johnna's application and would be more than happy to discuss her candidacy and qualifications with you further should you desire.

Very truly yours,



Richard C. Wesley
Senior Judge, U.S. Court of Appeals for the Second Circuit



John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques

LIVINGSTON COUNTY GOVERNMENT CENTER
6 COURT STREET
GENESEO, NEW YORK 14454-1030

Johnna Purcell

910 M Street NW
Washington, DC 20001
Jfp93@cornell.edu
724-812-6257

Writing Sample

The following writing sample is an excerpt from my final paper for my Federal Appellate Practice class. The assignment was to write a Supreme Court merits brief for the petitioner in the case of *Wardlow v. Texas*, 2020 WL 2059742 (Tex. Crim. App. 2020), cert. denied, 141 S. Ct. 190 (2020). The assignment asked us to assume that the petition for writ of certiorari had been granted and that the question before the Court was whether Texas's statutory requirement that a jury determine a capital defendant's future dangerousness is constitutional under the Eight and Fourteenth amendments in the case of defendants who were under 21 years old when they committed their crime.

This brief was originally over 50 pages in length. For the purpose of this writing sample, I have only included the question presented and a portion of the argument section considering the constitutionality of Texas's factor in light of the Supreme Court's jurisprudence. I have eliminated the statement of the case, statement of facts, and additional discussion of the scientific evidence regarding determinations of future dangerousness in juveniles. I have also modified the margins and page size from Supreme Court filing standards for ease of review.

QUESTION PRESENTED

Whether, under the Eighth and Fourteenth Amendments, Texas may continue to impose, and carry out previously imposed, death sentences for which future dangerousness is or was used to determine death eligibility for defendants who were under 21 years old at the time of the crime?

ARGUMENT

I. The Eighth Amendment Forecloses the Consideration of Future Dangerousness for Capital Defendants Who Committed Their Crimes Before the Age of 21.

“[T]he penalty of death is qualitatively different from a sentence of imprisonment.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). “It is unique in its total irrevocability . . . rejection of rehabilitation of the convict as a basic purpose of criminal justice . . . [a]nd absolute renunciation of all that is embodied in our concept of humanity.” *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Because a capital sentence is “the most severe punishment” in the American criminal justice system, “the Eighth Amendment applies to it with special force.” *Roper v. Simmons*, 543 U.S. 551, 568 (2005). As such, there is “a corresponding difference in the need for reliability in the determination that death is the appropriate punishment.” *Woodson*, 428 U.S. at 305. The Eighth Amendment does not tolerate unreliable or arbitrary determinations to support a capital sentence. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). The decision to impose death “cannot be predicated on mere ‘caprice’ or on ‘factors that are constitutionally impermissible or totally irrelevant to the sentencing process.’” *Id.* at 585 (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)). To meet the Eighth Amendment’s heightened standard, a death penalty framework must accord “significance to relevant facets of the character and record of the individual offender” or risk treating defendants “not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” *Id.* at 304.

a. The Eighth Amendment’s Reliability Requirement Cannot Be Met When Determining the Future Dangerousness of Defendant’s Who Were Under 21 at the Time of Their Crimes.

The Eighth Amendment requires heightened reliability when imposing a death sentence. *See, e.g., Johnson*, 486 U.S. at 584. For a death sentence to be constitutional, it must follow from a careful consideration of the defendant’s character. *See Roper* 543 U.S. at 569 (2005). A sentencer must be sure not only that the defendant committed the crime but also that the individual is sufficiently culpable to deserve a death sentence. *See Roper* 543 U.S. at 571; *Atkins v. Virginia*, 536 U.S. 304, 306 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988). This

standard requires a sentencer to evaluate the individual defendant's background and character. See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); see also *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime. . . .").

Additionally, this Court has long recognized that determinations regarding which sentencing procedures satisfy the Eighth Amendment are not static. *Furman v. Georgia*, 408 U.S. 238, 328 (1972) (Marshall, J. concurring) ("[T]he cruel and unusual punishment clause [is] not a static concept, but one that must be constantly re-examined 'in the light of contemporary human knowledge.'" (quoting *Robinson v. California*, 370 U.S. 660, 666 (1962))). The Eighth Amendment requires that courts reevaluate when a punishment no longer comports with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). When evaluating changing standards, a court must use "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

To the contrary, scientific understanding has directly affected Eighth Amendment jurisprudence. See *Roper* 543 U.S. at 569–70; *Atkins*, 536 U.S. at 316 n. 21 (noting scientific consensus on opposition to the death penalty for those with mental disabilities). This is particularly true for juvenile offenders. This Court has used scientific evidence to support their conclusions in several cases. See, e.g., *Miller*, 567 U.S. 460, 471–72 (holding juveniles cannot be sentenced to mandatory life without the possibility of parole); *Graham*, 560 U.S. at 68 (holding juveniles cannot be sentenced to life without the possibility of parole for non-homicide offenses); *Roper*, 543 U.S. at 569 (holding individuals cannot be executed for crimes they committed before they were 18 years old). Science has evolved since this Court heard these cases. Researchers now know that emerging adults' brains, from ages 18 to 20, are not fully mature. Therefore, emerging adults lack the ability to "regulate functions like judgment and self-control."¹ As such, the Texas capital sentencing statute's requirement of future dangerousness is inaccurate and does not withstand constitutional scrutiny.

i. A Fully Formed Character, Which Does Not Occur Prior to the Age of 21, Is Necessary to Determine Future Dangerousness.

To accurately determine if an individual is likely to be dangerous in the future, a sentencer must analyze that individuals' character. In the case of younger defendants, this determination can range from difficult to impossible. This Court has

¹ B.J. Casey, Richard J. Bonnie, Andre Davis, David L. Faigman & Morris B Hoffman, *How Should Justice Policy Treat Young Offenders?: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience* at 3 (2017) [hereinafter *How Should Justice Policy Treat Young Offenders?*].

recognized that an individual's age informs their criminal culpability. *See Thompson*, 487 U.S. at 834. The Court placed determinative emphasis on age when it “[f]orbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.” *Roper*, 543 U.S. at 578.

In its holding, the Court recommitted itself to the principle that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Id.* at 568 (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Then, the Court identified “[t]hree general differences between juveniles under 18 and adults” that merited disparate treatment. *Id.* at 569. Those differences are: (1) “[a] lack of maturity and an underdeveloped sense of responsibility,” (2) “vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure,” and (3) “character . . . that is not as well formed as that of an adult.” *Id.* at 569–70. Differences between juvenile and adult offenders make it more likely that a sentencer will inaccurately find an individual to have requisite culpability to be sentenced to death. *See id.* at 572.

In *Roper*, this Court recognized that it is difficult to accurately assess juveniles’ characters because they are still developing. *Id.* at 569–70. Asking a jury to determine future dangerousness is a similar inquiry. It asks a sentencer to determine if an individual has a character that makes them more likely to be violent. As the *Roper* Court recognized, “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Id.* at 570. Therefore, the determination of future dangerousness cannot be accurate for juveniles. After all, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.* No expert, judge, nor jury can make an accurate determination about the future dangerousness of an individual whose character is not yet fully developed.

ii. Outside the Death Penalty Context, This Court Has Recognized Juveniles Do Not Have Fully Formed Characters.

Five years after *Roper*, this Court spoke again about a juvenile’s culpability. This Court held that youthful offenders who did not commit homicide were not sufficiently culpable to be eligible for a life sentence without the possibility of parole. *Graham* 560 U.S. at 76. Essential to its holding was the expansion of *Roper*.

In *Graham*, this Court recognized that “developments in psychology and brain science continue[d] to show fundamental differences between juvenile and adult minds.” *Id.* at 68. The Court observed that “parts of the brain involved in behavior control continue to mature through late adolescence.” *Id.* Therefore, this Court

embraced the idea there are inherent differences between the character of juveniles and adults.

Critically, the very scientific support the Court relied on in coming to this conclusion did not exclusively speak to the character development of juveniles. In fact, the studies the Court cited observed that 20-year-olds had similarly developed characters to individuals under 18. *Id.*; see Brief for American Medical Association et al. as Amicus Curiae, 18 n.51, *Graham v. Florida*, 560 U.S. 48 (2010); see also Brief for American Psychological Association et al. as Amicus Curiae, 27, *Graham v. Florida*, 560 U.S. 48 (2010) (“This shift in the brain’s composition continues throughout adolescence; indeed, studies indicate that [frontal lobe development] continues into young adulthood.”). In setting the line at 18 years old, the Court chose to draw the line at the age of majority. *Roper*, 543 U.S. at 1197. However, even then the Court acknowledged that this was an arbitrary exercise. See *id.* at 1197–98 (“For the reasons we have discussed, however, a line must be drawn.”)

After *Roper*, this Court continued to embrace the principle that “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 567 U.S. at 471. In holding that the Eighth Amendment prohibits sentences of life without the possibility of parole for offenders who were under 18 at the time they committed a nonhomicide crime, the Court recognized several specific characteristics of youthful offenders. The Court noted that juveniles have difficulty “weighing long-term consequences” exhibit “a corresponding impulsiveness” and are “reluctan[t] to trust defense counsel.” *Graham* 560 U.S. at 71–72, 78. The Court expanded the scope of its holding just two years later to the imposition of mandatory life without the possibility for parole for juvenile offenders—regardless of the underlying crime. *Miller*, 567 U.S. at 480. Again, the Court recognized that the “transient rashness, proclivity for risk, and inability to assess consequences” of young people lessens their moral culpability. *Id.* at 472. Thus, a trial court must consider a juvenile’s unique characteristics—which often disappear with age—prior to sentencing them to life without parole. *Id.* at 477–78. While part of the rationale for utilizing these three distinctions came from common-sense personal observations, the Court relied primarily upon the growing base of psychological research. *Id.* at 471 (“Our decisions rested not only on common sense—on what ‘any parent knows’—but on science and social science as well.”); *Roper*, 543 U.S. at 569.

b. Scientific Advancements Show That No One Can Accurately Determine Future Dangerousness Before the Age of 21 Because the Brain Is Not Sufficiently Developed.

Society’s standards of decency have not remained stagnant since the Court last spoke on the Eighth Amendment’s sentencing restrictions on juvenile offenders.² When

² Even the Texas Legislature has identified the problematic state of its death penalty statute, but it will not take up the issue until 2021. Jolie McCollough, *Texas executes Billy Wardlow, who was 18*

evaluating society's standards of decency, courts should aim to use "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). While legislative enactments are the quintessential objective indicia, scientific advancements are another relevant form of evidence. *See Roper*, 543 U.S. at 568–69.

Over the last decade, scientists have created more precise tools for taking magnetic images of the brain, invented a new form of Magnetic Resonance Imaging (MRI) to study the brain's wiring, and developed novel approaches to understand the brain's functional network. Brief for Professional Organizations, Practitioners, and Academics in the Field of Neuroscience, Neuropsychology, and Other Related Fields as Amicus Curiae at 9 [hereinafter Brief for Professional Organizations]. These advances have produced evidence showing what the Court has assumed to be true—adolescent behaviors do not stop at the age of 18. *Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.") Reinforcing the Court's beliefs, research in neuroscience and brain development has made clear that the brain is not "recognizably *adult* until after the age of 20." Brief for Professional Organizations at 8 (emphasis in original).

Moreover, even since *Miller* our understanding of human development and psychology has also improved dramatically. Leading diagnostic manuals now recognize that antisocial behavior from children and adolescents often occurs in isolated incidents and is not evidence of a mental disorder.³ Numerous peer reviewed studies support the conclusion "that more than 90% of all juvenile offenders desist from crime by their mid-20s."⁴ "Predictions of future violence in the case of an 18-year-old are inherently unreliable" because they are "overwhelmingly likely to grow out of it." Brief for Professional Organizations at 9.

c. Billy Is Living Proof These Scientific Advancements Are Accurate and the Jury's Determination of His Future Dangerousness Was Not.

By the age of 20, Billy was a high-school dropout and had been convicted of capital murder. Billy knew that he would be incarcerated for the rest of his life. Under circumstances where many would become violent or angry, Billy did not. Instead, he

when he killed a man. Experts argued that's too young for a death sentence, Tex. Trib. (July 8, 2020), <https://www.texastribune.org/2020/07/08/texas-execution-billy-wardlow/>.

³ AMERICAN PSYCHIATRIC ASSOCIATION, *Diagnostic and Statistical Manual of Mental Disorders* 726 (5th ed. 2013) ("Child or Adolescent Antisocial Behavior[:] This category can be used when the focus of clinical attention is antisocial behavior in a child or adolescent that is not due to a mental disorder (e.g., intermittent explosive disorder, conduct disorder). Examples include isolated antisocial acts by children or adolescents (not a pattern of antisocial behavior)").

⁴ Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 *Neuroscience* 513, 516 (2013).

matured. Since turning 21, Billy has not engaged in violence. No one that knows him today sees him as threatening or dangerous. His character is not “irretrievably depraved,” *Roper*, 543 U.S. at 570, or “incorrigible,” *Graham*, 560 U.S. at 72.

Indeed, Billy is known for his kindness. He has a reputation as someone who does not “bully, steal, or manipulate.” Exhibit 6 to the Subsequent Application for Writ of Habeas Corpus, at 7 (declaration of Tony Ford). Billy has avoided the typical dilemmas of prison life. For instance, Billy is not, nor has he ever been, a member of a prison gang. *Id.* He is known for working to quell racial tensions by speaking out against racism. *Id.* at 15. He has helped fellow inmates learn math, science, and coding. Exhibit 7 to the Subsequent Application for Writ of Habeas Corpus, at 1–2 (declaration of Mark Robertson).

“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Roper*, 543 U.S. at 570. Nevertheless, a jury’s finding permanently ascribes to Billy a character which he no longer has. Indeed, Billy’s character has fundamentally changed since the day he committed his crime. His risky and impulsive behaviors have “cease[d] with maturity.” *Roper*, 543 U.S. at 570 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Billy is an example of the reality that a determination of future dangerousness can be inaccurate for emerging adults, but he is not the only case. Nearly all emerging adults who engage in violent conduct during their youth will stop doing so as they mature.⁵ Moreover, as was Billy’s case, between 25 and 50 percent of young offenders will never commit another crime. Brief for Professional Organizations at 18 (citing Megan Kurlycheck, Shawn Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Felony Study*, 50 Criminology 71 (2012)).

The jury was wrong about Billy. But the decision before this court is not aimed at retroactively overturning a jury’s verdict based on an incorrect factual finding. Rather, it concerns the question that the Texas death penalty statute asks the jury to answer itself. The constitutional error was not that the jury who sentenced Billy to death came to the wrong conclusion, but that the Texas death penalty statute does not properly empower a sentencer to come to the correct one. As the amici put it, “predictions of future violence in the case of an 18-year-old are inherently unreliable and will lead to many more false positives than accurate predictions.” Brief for Professional Organizations at 17. The scientific research is now clear that a jury can

⁵ Laurence Steinberg, Elizabeth Cauffman & Kathryn Monahan, *Psychological Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, DOJ Juvenile Justice Bulletin (Mar. 2015).

never reliably determine the future dangerousness of an 18 to 20-year-old. Billy is living proof of that. *Id.* Thus, the Texas capital punishment sentencing scheme which only considers future dangerousness as an aggravating factor at cannot pass constitutional muster.

d. This Court's Holdings in *Jurek v. Texas* and *Barefoot v. Estelle* Do Not Foreclose Limiting the Consideration of Future Dangerousness to Those Who Were 21 or Older at the Time of Their Crimes.

Under the Texas Capital Sentencing Procedure, the jury must make answer two questions at the penalty phase. These questions ask the jury to make determinations on two special issues. Special Issue 1, asks the jury to determine whether “the Defendant will more likely than not, commit criminal acts of violence in the future so as to constitute a continuing threat to society.” *See* Tex. Crim. Proc. Art. 37.071 § 2. This question asks the jury to determine the future dangerousness of the individual. Special Issue 2 asks if “there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence.” *Id.* If the jury answers Special Issue 1 in the negative, the court must sentence the defendant to life imprisonment without parole. *Id.* at § 2(g). Consequently, the State’s case for imposing the death penalty relies on a jury’s determination of future dangerousness.

This Court has twice considered the constitutionality of Special Issue 1. The first time the Court considered the question was in *Jurek v. Texas*, 428 U.S. 262, 274 (1976). Jerry Lane Jurek, who was 22 years old at the time of his crimes, challenged the constitutionality of the Texas capital sentencing procedure under the Eight and Fourteenth Amendments. *Id.* at 266, 274. In part, the petitioner argued that the statute was unconstitutional because it was “impossible to predict” future dangerousness as required by Special Issue 1. The Court rejected those arguments. *Id.* at 275–76. In doing so, it noted that “prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system.” *Id.* at 275. As a result, it was constitutional to ask a jury to make findings that judges frequently make in other contexts such as bail and parole. *Id.* The Court noted, however, that it is “difficult” to make a determination of future dangerousness. *Id.* at 274. As such, the Court demanded juries have access to “all possible relevant information about the individual defendant whose fate it must determine.” *Id.* at 276.

After upholding the constitutionality of the Texas Capital Sentencing Statute, this Court was asked to determine what sort of evidence could prove future dangerousness. Specifically, in *Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983), this Court was asked to determine if the expert testimony of psychiatrists may speak to the determination of future dangerousness for the purpose of Special Issue 1. The Court held that experts were permitted to testify on the future dangerousness of a defendant at the punishment phase of a capital trial. *Id.* at 901. Citing *Jurek*, Justice

Stevens, writing for the majority, reasoned that if it was possible “for even a lay person sensibly to arrive at” the conclusion of future dangerousness that a psychiatrist is able to form an expert opinion on the issue. *Id.* at 896. Echoing *Jurek*, the Court recognized that the “adversar[ial] process” must “sort out the reliable from the unreliable evidence and opinion about future dangerousness.” *Id.* at 901.

But the Court did not go as far as to suggest that the mere adversarial nature of the process was sufficient to achieve the heightened reliability required by the Eighth Amendment. Rather, it found that because psychologists incorrectly predicted future dangerousness “most of the time” and not always, the testimony was, “at least as of now” constitutionally permissible. *Id.* Notably, at the time he committed his crimes, Thomas A. Barefoot was 38 years old.⁶ See *Barefoot v. Estelle*, 697 F.2d 539, 594 (5th Cir. 1983). Consequently, the concerns which the American Psychiatric Association and the petitioner identified in *Barefoot* were more generalized grievances concerning the shortcomings of experts’ ability to predict future dangerousness. See *Barefoot*, 463 U.S. at 901. They were not tailored to the specific challenges presented in assessing juveniles.

Billy’s case fits squarely in the space left open in *Barefoot*. In *Barefoot*, the Court noted that the expert testimony on future dangerousness was permitted because, in 1983, the court believed that it was occasionally accurate. However, that can no longer be the case. Since the Court decided *Barefoot* in 1983, neuroscientists have determined that one cannot reliably predict future dangerousness for individuals under the age of 21. In the situations where the determination is correct, it is only by chance. In the case of emerging adults, neuroscientists believe that there is no possible way for an expert to form an accurate expert opinion on future dangerousness. Brief for Professional Organizations at 10 (“No known technology or methodology would allow an expert to differentiate between an emerging adult whose antisocial behavior is due to neurological immaturity and an emerging adult who is likely to be dangerous in the future.”). The determination is not accurate sometimes—it is nothing more than a guess. Therefore, even by the terms that *Jurek* and *Barefoot* set out, the consideration of future dangerousness for emerging adults is constitutionally suspect because psychiatrists can never make a sound prediction.

This Court need not abrogate neither the holding in *Jurek* nor *Barefoot* to rule in Billy’s favor. The holdings in *Jurek* and *Barefoot* stand for the principle that the consideration of the question and evidence of future dangerousness may be constitutionally permissible. See *Barefoot*, 463 U.S. at 901 (“We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness.”); *Jurek*, 428 U.S. at 276. Even after a ruling for Billy that would still be true. The effect of a ruling for Billy Wardlow would not upset *Jurek* and *Barefoot*. It would carve out

⁶ *Two Put to Death After Pleas Fail*, N.Y. Times (Oct. 30, 1984)
<https://www.nytimes.com/1984/10/30/us/two-put-to-death-after-pleas-fail.html>.

a particular category of individuals who are not subject to the future dangerousness analysis.

II. Consideration of Age Merely as a Mitigating Factor Is Insufficient to Comply with the Eighth Amendment's Mandate.

Jurek makes clear that “the age of the defendant” is one facet of “relevant information” a jury must be permitted to hear. 428 U.S. at 273. It is not enough, however, for the jury to simply consider a defendant’s age as a mitigating factor in the Texas capital sentencing scheme.

When this Court examined Texas’s capital sentencing statute in *Jurek*, there was no special issue which explicitly compelled the jury to consider mitigating evidence. *See* 428 U.S. at 265 n.1. The Texas Court of Criminal Appeals, however, interpreted the question of future dangerousness as allowing consideration of mitigating evidence. *Jurek v. Texas*, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975). In its current form, Tex. Crim. Proc. Art. 37.071 § 2 seeks to displace consideration of age for the question of future dangerousness by creating a different category under which the jury could consider age as a mitigating factor.⁷

Cabining consideration of age solely to a mitigation category is insufficient for two reasons. First, it does not reach the heart of the issue in cases such as Billy’s. In these cases, the problem is not that the defendant’s age mitigates the fact that they are likely to be dangerous in the future. Instead, the problem is that it is impossible to tell that a person will be dangerous in the future because of their age. *See* discussion *supra*, Section I.A. Age is not just a mitigating factor that reduces culpability, it is an obstacle that inhibits the inquiry into future dangerousness for individuals aged 18 to 21. Considering age as a mitigating factor does not make the determination of future dangerousness more accurate. Therefore, doing so does not make the determination of Special Issue 1 meet the Eighth Amendment’s heightened reliability requirement.

Second, this Court has cautioned against this approach. Nothing in *Roper*’s rationale precludes the Court from reassessing the placement of the line in light of new neuroscientific research and treatment of emerging adults. To the contrary, in *Roper*, the Court recognized that the “linchpin” of the petitioner’s argument against a categorical bar of executing children was that a jury would be able to consider age as a mitigating factor. 543 U.S. at 572. Rejecting this argument, the Court explained that “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity,

⁷ Texas altered its procedure because the Court held that the prior form of the statute was constitutionally inadequate under the Eighth and Fourteenth Amendments because it “did not provide a vehicle for the jury to give mitigating effect” to certain types of evidence. *Penry*, 493 U.S. at 324.

vulnerability, and lack of true depravity should require a sentence less severe than death.” *Id.* at 572–73. In fact, the problem of considering youth only in mitigation goes beyond mere cold-bloodedness. This approach runs the risk of rogue actors improperly treating youth as an aggravating circumstance instead of a mitigating one. That is precisely the strategy that the prosecutor took in *Roper*. *See* 543 U.S. at 573. In so recognizing, the Court held that sentencers could not adequately consider the relevant qualities of juveniles under a mitigation framework.

Nevertheless, that is precisely what Texas seeks to do. Classifying age solely as a mitigating factor obfuscates its proper role in the consideration of other special issues. The Eighth and Fourteenth Amendments do not allow a state to cure an inherently inaccurate procedure by considering age merely as a mitigating factor. Instead, age needs to be considered at the outset to determine if the determination of future dangerousness can ever accurately be made.

CONCLUSION

For the foregoing reasons, Billy Wardlow respectfully requests that this Court reverse the decision of the Texas Court of Criminal Appeals and grant his request for post-conviction relief.

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Date of JD/LLB	May 18, 2024
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Journal(s)	The George Washington Law Review
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May 28, 2023

The Honorable Jamar K. Walker
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Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising 3L at the George Washington University Law School and a Notes Editor on the *George Washington Law Review*. I am writing to apply for a 2024-2025 clerkship in your chambers.

Attached for your review are my resume, transcript, writing sample, and letters of recommendation from the Honorable Russell Canan, Professor Daniel Bousquet, and Aditi Goel of the Sixth Amendment Center. The writing sample is an excerpt from a judicial opinion I wrote as a final paper for my Judicial Lawyering class.

Thank you for your consideration, and please feel free to contact me at (508) 944-4594 or kirapyne@law.gwu.edu if I can provide you with any further information.

Respectfully,



Kira Pyne

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EDUCATION

The George Washington University Law School, Washington, DC

3.74 GPA, J.D. expected May 2024

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Note: “*Fare is Unfair*: A new totality of circumstances analysis for juvenile waivers of counsel”

American University School of Public Affairs, Washington, DC

B.A., *magna cum laude*, Interdisciplinary Studies, May 2020

Activities: Rude Mechanicals Theatre Troupe (Executive Director), Phi Alpha Delta Pre-Law Fraternity
Thesis: “Analysis of Bullying Policies and Chronic Absenteeism in DC Public High Schools”

EXPERIENCE

Blank Rome, Washington, DC

Summer Associate, May 2023-Present

Family Justice and Litigation Clinic, Washington, DC

Student Attorney, January 2023-Present

- Represents clients in divorce, child custody, and protection order matters
- Represented petitioner in a CPO trial and successfully obtained a one-year CPO
- Performs direct examinations, cross examinations, and oral arguments in family court
- Assists family court plaintiffs in properly serving defendants

United States District Court, Washington, DC

Judicial Intern to the Honorable Paul L. Friedman, September-November 2022

- Drafted portions of an opinion regarding admission of evidence in a second-degree murder trial
- Researched and drafted an opinion on jurisdictional discovery in an ongoing terrorism case
- Answered questions and assisted potential jurors during voir dire.

Sixth Amendment Center

Summer Intern, May-August 2022

- Tracked state updates about indigent defense via news articles, legislation, and court cases
- Researched and wrote summaries about states and the operation of their public defense systems
- Collaborated on researching Texas court systems in preparation for a statewide indigent defense evaluation

Justice Innovation Lab at the George Washington University Law School, Washington, DC

Research Assistant, May-August 2022

- Interpreted Excel data of criminal charges and determines how they are related
- Wrote memos summarizing major findings of data
- Conducted interviews with prosecutors and defense attorneys regarding escalating sanctions in their state

CityYear, Providence, RI

Americorps Member, August 2020-June 2021

- Provided teacher support and individual tutoring for a fourth-grade class, both in-person and virtually
- Tracked student attendance and worked with families to create attendance plans

Coalition for Juvenile Justice, Washington, DC

Communication and Administrative Assistant, May 2019-July 2020

- Tracked state procedures regarding COVID-19 in youth facilities and wrote a document of best practices that was sent to juvenile justice leaders throughout the United States
- Worked with board member to plan and run monthly meetings with Midwestern Regional members of CJJ

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Fall 2021

Law School
Law

LAW 6202	Contracts Swaine	4.00	A
LAW 6206	Torts Turley	4.00	A-
LAW 6212	Civil Procedure Berman	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Kettler	3.00	B+
Ehrs	15.00 GPA-Hrs	15.00	GPA 3.689
CUM	15.00 GPA-Hrs	15.00	GPA 3.689
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			

Spring 2022

Law School
Law

LAW 6208	Property Kieff	4.00	A
LAW 6209	Legislation And Regulation Schwartz	3.00	A-
LAW 6210	Criminal Law Weisburd	3.00	A
LAW 6214	Constitutional Law I Cheh	3.00	A-
LAW 6217	Fundamentals Of Lawyering II Kettler	3.00	B+
Ehrs	16.00 GPA-Hrs	16.00	GPA 3.750
CUM	31.00 GPA-Hrs	31.00	GPA 3.720
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			

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Fall 2022

Law School
Law

LAW 6230	Evidence Durrer	3.00	A-
LAW 6380	Constitutional Law II Fontana	3.00	B
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Canan	2.00	A-
LAW 6888	Crisis & Legal Controversy Cia Petrila	2.00	B+
Ehrs	13.00 GPA-Hrs	10.00	GPA 3.400
CUM	44.00 GPA-Hrs	41.00	GPA 3.642
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			

Spring 2023

LAW 6360	Criminal Procedure	4.00	A
LAW 6400	Administrative Law	3.00	A+
LAW 6624	Family Justice Litig. Clinic	6.00	A
Ehrs	13.00 GPA-Hrs	13.00	GPA 4.077
CUM	57.00 GPA-Hrs	54.00	GPA 3.747
Good Standing			
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Fall 2022

Law School
Law

LAW 6657	Law Review Note	1.00	-----
Credits In Progress:		1.00	

Spring 2023

LAW 6657	Law Review Note	1.00	-----
Credits In Progress:		1.00	

Fall 2023

LAW 6218	Prof Responsibility & Ethics	2.00	-----
LAW 6232	Federal Courts	3.00	-----
LAW 6624	Family Justice Litig. Clinic	6.00	-----
LAW 6640	Trial Advocacy	3.00	-----
LAW 6658	Law Review	1.00	-----
Credits In Progress:		15.00	

***** CONTINUED ON PAGE 2 *****



Katie Cloud
Katie Cloud
Interim University Registrar

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OFFICE OF THE REGISTRAR

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Record of: Kira Reynolds Pyne

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
***** TRANSCRIPT TOTALS *****				
	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	57.00	54.00	202.33	3.747
OVERALL	57.00	54.00	202.33	3.747
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Katie Cloud
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Interim University Registrar

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2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
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201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
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201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

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CORCORAN COLLEGE OF ART + DESIGN

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GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I/ and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-.

Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CN/P, Conditional converted to Pass; CN/F, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

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June 01, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of the clerkship application of Kira Pyne, a top-notch rising 3L student at George Washington University Law School.

I am a visiting associate professor at GWU, where I have taught and supervised students since Summer 2021. I previously practiced law at Feldesman Tucker Leifer Fidell LLP and Jenner & Block LLP, both here in Washington, D.C. I clerked on the U.S. Court of Appeals for the First Circuit and graduated from Yale Law School in 2014.

I have taught and supervised Kira in the GW Family Justice Litigation Clinic since January 2023. I supervised her and her partner in their representation of two clients, mothers facing severe domestic violence and contentious custody litigation. I saw Kira at minimum twice a week for extensive one-on-two supervision, met with her approximately once a week in a ten-student seminar, and communicated with her roughly three to four times a week by email/phone. I had the opportunity to supervise Kira in two contested trials and multiple other status hearings.

From my extensive experience working with her, I can say with confidence that Kira is a superb lawyer who would make an excellent judicial clerk. She has a gifted legal mind, complemented by a strong work ethic. Her impressive academic record speaks for itself, but it only presents part of the picture. Kira brings passion and commitment to her work; she cares about the right things, for the right reasons. The thing that impresses me most about Kira is her willingness to step up and take complete ownership of her casework, something that few law students, particularly 2Ls, are willing to do.

Kira is a strong, careful writer and researcher. In your chambers, Kira will deliver polished products and commit herself completely to your important work. You will be able to rely and count on Kira. You will find her to be a diligent professional, empathetic, kind to all those with whom she interacts, and a trusted interlocutor on the issues before the Court. Kira has my highest recommendation.

Please do not hesitate to contact me if I can offer additional observations. I would be delighted to speak in more detail about my experience supervising Kira.

Best,

Daniel Bousquet
Friedman Fellow and Visiting Associate Professor of Clinical Law for the Family Justice Litigation Clinic
The George Washington University Law School
dbousquet@law.gwu.edu

Daniel Bousquet - dbousquet@law.gwu.edu

June 01, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter in support of Kira Pyne's application to be your law clerk. I had the pleasure of having Ms. Pyne in my Judicial Lawyering class in the Fall of 2022. I believe she would be a successful clerk due to her strong writing skills, passion for litigation, and ability to communicate and work effectively in a collaborative environment.

The judicial lawyering course at GW Law is taken concurrently by students who are externing in a judge's chambers. Ms. Pyne spent the fall semester doing extensive writing in the chambers of Judge Friedman, a judge on the DC District Court. In the course, Ms. Pyne was tasked with writing a judicial opinion. This opinion addressed the admissibility of certain evidence based on an analysis of relevance, probative value, and the constraints of the Fifth Amendment. In this opinion, Ms. Pyne presented a clear, coherent, and persuasive argument justifying her decision to admit the evidence. Because of her externship working for Judge Friedman and writing experience in class, I am confident that she would be able to produce strong written work for your chambers.

In addition to having Ms. Pyne as a student, we have continued to speak extensively about her desire to be a clerk post-graduation. She has expressed a passion for litigation and feels that working as a clerk will both (1) allow her to better understand how judges think and make decisions and (2) continue to hone her research and writing skills, as these will make her a more effective advocate after she has completed her time in chambers. We have also discussed her role as a Student Attorney in the Family Justice and Litigation Clinic, in which she has appeared in court on behalf of clients, an experience that only confirmed her love for the courtroom.

One of the reasons Ms. Pyne is extremely passionate about being a litigator is because she loves working with people. She is personable, courteous, and a responsive team player. During her class and externship experience, she demonstrated both a willingness to take initiative and to receive and respond to constructive criticism and feedback in a productive way.

I highly recommend her.

Sincerely,

Russell F. Canan

Judge
Superior Court of the District of Columbia

Russell Canan - russellcanan@gmail.com - (202) 879-1952



May 29, 2023

To the Honorable Judge:

I am writing to give my highest possible recommendation to Kira Pyne for a judicial clerkship in your chambers. As Ms. Pyne's direct supervisor in her ten-week summer internship at the Sixth Amendment Center (6AC), I witnessed Ms. Pyne's deep commitment to learning about our nation's indigent defense crisis and the law's application to criminal justice across America. Based on Ms. Pyne's outstanding contributions during the internship, and my extensive experience as a law student supervisor and former public defender, I am confident that Ms. Pyne would be a terrific fit for this clerkship.

Ms. Pyne's performance as a 6AC intern was exemplary. In tracking the news, legislation, and caselaw pertaining to indigent defense in various states daily, researching the administration, funding, and delivery of indigent defense systems in multiple states, and researching Texas court structures in preparation for a 6AC evaluation, Ms. Pyne was highly perceptive, thorough, and self-motivated. Ms. Pyne is a thorough and efficient researcher with a formidable ability to aptly characterize even the most nuanced issues in a case.

In discussions with 6AC's Executive Director, staff, and other law student interns, Ms. Pyne drew on her personal background to advance discussions about criminal justice, indigent defense, and racial justice and helped to create a welcoming environment in which others felt comfortable sharing their own perspectives. In supervising Ms. Pyne, I met with her weekly to discuss her projects' progress and reviewed her submissions. Ms. Pyne's work was truly phenomenal and reflected her ability to navigate subtle legal distinctions and details.

As a supervisor of more than six years now, I have learned that a law student who is passionate and genuinely curious about justice, whose work product can be trusted as reliable, and who is a team player are invaluable traits that are rare to come by in one person. Ms. Pyne embodies all these characteristics. Ms. Pyne is clearly an exceptionally intelligent woman who is thoughtful and conscientious about her work. I feel honored to have contributed to Ms. Pyne's legal training, and I am confident that your honor will not regret granting Ms. Pyne a clerkship in your chambers.

If I can further assist in your deliberation, please do not hesitate to contact me at aditi.goel@6ac.org or (408) 242-9336.

Sincerely,

A handwritten signature in black ink, appearing to read 'Aditi Goel', with a stylized flourish extending from the end.

Aditi Goel, Senior Program Manager
Sixth Amendment Center
(408) 242-9336
aditi.goel@6ac.org

WRITING SAMPLE

Kira Pyne

1234 Massachusetts Ave. NW #702 Washington, DC 20005
(508) 944-4594 – kirapyne@law.gwu.edu

This judicial opinion was submitted as my final paper for my Judicial Lawyering class in Fall 2022. The opinion addressed whether two pieces of evidence—a 2015 interview discussing the meaning of Defendant’s tattoos and photos of the tattoos—should be admitted. I determined the outcome and justified the reasoning. I have omitted the background section for purposes of length.

This writing sample has not been edited by anyone except me.

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division—Felony Branch**

LEGAL STANDARD

Relevance

Relevant evidence “has any tendency to make a fact more or less probable than it would be without the evidence.” FED. R. EVID. 401. Relevance is determined by analyzing the materiality and probative value of the proffered evidence. *In re L.C.*, 92 A.3d 290, 297 (D.C. 2014). Materiality is determined by whether the proffering party establishes that the evidence is “a condition to prevailing on the merits of his case.” *Id.* Probative value means that the evidence has a tendency to “establish the proposition that it is offered to prove.” *Id.* Evidence “need not even make that proposition appear more probable than not.” *Id.* at 298 (quoting 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 185 at 733 (6th ed. 2006)). Whether the evidence will serve its purpose is not to be decided while determining admissibility. *See id.*

Relevance requires a “link, connection or nexus between the proffered evidence and the crime at issue.” *Johnson v. United States*, 552 A.2d 513, 516 (D.C. 1989). Evidence that is “too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with respect to the third party’s guilt,” should generally be excluded. *Id.* “In general, if evidence is relevant, it should be admitted unless it is barred by some other legal rule.” *In re L.C.*, 92 A.3d at 297.

Probative Value

The District of Columbia has adopted the policy set forth in Rule 403 of the Federal Rules of Evidence. *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996). The determination of evidence as relevant does not end the court’s decision on admittance; the court “must also balance the probative value of the evidence ‘against the risk of prejudicial impact.’” *Winfield v.*

United States, 676 A.2d 1, 5 (D.C. 1996) (citation omitted). “Evidence ... although relevant and otherwise admissible, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” *Johnson*, 683 A.2d at 1090. The court is awarded great discretion in determining whether unfair prejudice outweighs the probative value because “[t]he trial court is in the best position to perform the subjective balancing that Rule 403 requires.” *United States v. Long*, 328 F.3d 655, 662 (D.C. Cir. 2003) (internal quotations omitted) (citations omitted).

Fifth Amendment Rights

The Fifth Amendment provides, in pertinent part, that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. “[A] violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.” *Chavez v. Martinez*, 538 U.S. 760, 770 (2003). The word “witness” limits “compelled incriminating communications to those that are ‘testimonial’ in character.” *United States v. Hubbell*, 530 U.S. 27, 34 (2000). “[T]o qualify for Fifth Amendment protection, a communication must be (1) testimonial, (2) incriminating, and (3) compelled.” *Hübel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 189 (2004).

Testimonial communication by an accused must explicitly or implicitly either relate a factual assertion or disclose information. *Doe v. United States*, 487 U.S. 201, 210 (1988). Expression of the contents of an individual’s mind are testimonial under the Fifth Amendment. *Id.*, n.9. This may include giving objective information to law enforcement that divulges one’s mental processes. See *United States v. Kirschner*, 823 F.Supp.2d 665, 669 (E.D.Mich. 2010) (holding that compelling a defendant to divulge his computer password was testimonial because the evidence acquired from the computer was used to incriminate him).

Incriminating evidence “protects against any disclosures that a witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Kastigar v. United States*, 406 U.S. 441, 445 (1972). In other words, the evidence itself does not need to be directly incriminating, but is protected by the Fifth Amendment if the compelled testimony will lead to the discovery of other inculpatory evidence. *Doe*, 487 U.S. at 208.

Not all compelled information that may incriminate an individual is protected by the Fifth Amendment. *Fisher v. United States*, 425 U.S. 391, 410 (holding that a taxpayer cannot avoid complying with a subpoena because the document, whether it contains his writing or someone else’s, would incriminate him). Additionally, “there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating.” *Hubbell*, 530 U.S. at 34-35. “[E]ven though the act may provide incriminating evidence, a [] suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice.” *Id.* at 35. Exhibiting physical characteristics is not the same thing as a sworn communication by the defendant. *See id.*

ANALYSIS

I. Admission of 2015 Police Interview Transcript

Relevance

Defendant argues his 2015 interview regarding the meaning of his tattoos is irrelevant because “[he] explains why he himself would never snitch or speak with the police about an incident he was the victim of.” Def. Opp. at 7. The government argues Defendant’s beliefs against “snitching” are so strong he got tattoos representing them, and make it more

likely he intended to pressure Ms. Styles from speaking to police about Defendant's actions. *See* Gov't Reply at 2.

Part of the transcript is irrelevant and therefore excluded. At the beginning of the transcript, Defendant and the detective are discussing Defendant's guns and habits with shooting. Tr. 1. Defendant's ownership of guns in 2015 is irrelevant to whether he took action to prevent Ms. Styles from testifying against him and does not support any proffered fact by the government regarding the obstruction charge. Only the relevant portions identified in the government's motion will be analyzed as admissible for trial. *See* Gov't Mot. at 4-7.

The relevant portion of the transcript consists of Defendant and the detective discussing Defendant's tattoos, their meanings, and Defendant's general feelings regarding "snitches." Defendant is correct in pointing out that he is only discussing *his* personal feelings in a situation where he was the victim. *See* Def. Opp. at 7. However, the fact that Defendant holds these beliefs about "snitches," and feels strongly enough about these beliefs to get tattoos representing them, is directly relevant in determining whether he intended to prevent Ms. Styles from testifying.

Defendant's statements on whether or not *he* would "snitch" on someone is still relevant about his feelings towards other people "snitching". The jury may still find his statements have no effect on whether Defendant threatened Ms. Styles, but as stated above, the jury's use of the evidence is not considered in the court's relevance determination.

The portion of the interview quoted in the government's motion, *see* Gov't Mot. at 4-7, is not barred from evidence due to irrelevance. The rest of the interview is excluded.

Prejudice

Determining that evidence is relevant does not end the court's inquiry into admissibility. When the probative value of evidence is substantially outweighed by unfair

prejudice, the evidence may be excluded. FED. R. EVID. 403. Defendant argues the proffered evidence may cause a jury to convict Defendant “on irrelevant statements regarding snitching that have no nexus and are not temporally relevant.” Def. Opp. at 10. Is it important a jury convicts a defendant on evidence presented at trial, not because they believe a defendant is a habitual criminal and therefore likely committed the charged offense. *See id.*

As discussed by the government, however, Defendant’s tattoos are probative into his intent when he spoke with Ms. Styles. Gov’t Reply at 2. Defendant discusses his strongly held beliefs regarding “snitches”, which are so important to him, he got them tattooed on his body. Defendant also makes clear that his views on “snitching” are not limited to individuals who were actually involved in a crime, but also to those who were only witnesses. *See* Gov’t Reply at 4-5. Defendant’s discussion with officers from 2015 regarding the meaning of his tattoos are probative into his mindset when he told Ms. Styles to “do the right thing,” regardless of whether Ms. Styles was actually intimidated by his statements. *See* D.C. Code § 22-722 (a defendant must “knowingly” use intimidation with the intent to cause an individual to withhold testimony).

Rule 403 requires prejudice to “substantially” outweigh probative value. FED. R. EVID. 403. That is not the case here. There is no evidence of a previous crime committed by Defendant in the 2015 conversation. Defendant was the *victim* of a crime, and although he discusses “putting a knife in him,” Gov’t Mot. at 7, it is clear Defendant is discussing a hypothetical situation unrelated to the current charges. Defendant’s statements of his tattoos are probative of his mindset when he told Ms. Styles to “do the right thing,” and is not substantially outweighed by the danger of prejudicing the jury.

Fifth Amendment Rights

The Court will now address whether Defendant’s 2015 interview is testimonial. To qualify for Fifth Amendment protection against self-incrimination, a statement by a defendant must be testimonial. *Hübel*, 542 U.S. at 189. The government argues Defendant’s statements are not testimonial, but are admissible as party admissions. Gov’t Reply at 5. Defendant argues that because the government is relying on the tattoos, in conjunction with the 2015 interview, Defendant’s statements are testimonial for purposes of the self-incrimination clause. *See* Def. Opp. at 13.

Under Rule 801(d)(2)(A) and D.C. practice, “a confession (or other statement) by a defendant may be received in a criminal case as a statement of an opposing party.” 2 LAW OF EVIDENCE IN THE DISTRICT OF COLUMBIA § 801.01 (2022). “Nevertheless, receipt of such statements is constrained by a host of constitutional . . . considerations.” *Id.* The government seems to be arguing that Defendant’s statements are merely admissible because they are party admissions; if this were the case, no statement by a defendant would be protected by the Fifth Amendment. A constitutional analysis must be completed before admitting a statement as a party admission.

An accused’s communication is testimonial when the communication relates factual assertion or discloses information, either implicitly or explicitly. *Hübel*, 542 U.S. at 177. In the 2015 interview, Defendant is explicitly disclosing information about the meanings of his tattoos and his personal feelings regarding people who “snitch” to police. *See* Gov’t Mot. at 4-7. Therefore, the interview is testimonial for Fifth Amendment purposes and not merely admissible as a party admission without further analysis.

Defendant's interview statements are incriminating. The government is using Defendant's statements to support their position that Defendant committed obstruction of justice. Although the statements themselves are not directly incriminating, as Defendant is not discussing any crime he partook in, the statements support the notion that Defendant intended to intimidate Ms. Styles when he spoke with her on the phone.

Finally, to qualify for Fifth Amendment protection from self-incrimination, Defendant's statements must be compelled. Defendant's 2015 interview with police fails to qualify as compelled. At the time of the interview, Defendant was not under arrest; he was the victim of a crime and chose to speak with police after the matter, although he chose not to disclose the identity of his shooter. He voluntarily discussed his views on "snitching" to police officers, and supplemented his views by explaining the meanings of his tattoos. *See* Gov't Mot. at 4-7. Defendant is not being called, at this time, to re-explain the meaning of the tattoos. Accordingly, Defendant's statements to police in 2015 do not qualify as compelled, and do not qualify for Fifth Amendment protection from self-incrimination.

Because Defendant's statements to police from 2015 addressing his views on "snitching" and discussing the meanings of his tattoos are not barred by relevance, prejudice, or offense of Defendant's Fifth Amendment rights against self-incrimination, the relevant portions of the interview are admitted into evidence.

II. Admission of Defendant Displaying Tattoos at Trial

Relevance

Defendant walks a detective through his tattoos in the 2015 interview, explaining some that express his views on people who report crimes or act as witnesses for police. *See* Gov't Mot. at 4-7. Accordingly, the government wishes to compel Defendant to display his tattoos at trial.

For similar reasons as the interview itself, the government argues that these tattoos are relevant to show Defendant's state of mind regarding "snitches" and makes it more likely Defendant intended to threaten Ms. Styles when they spoke on the phone. *See* Gov't Reply at 2.

Defendant's tattoos support his statements to police and make it more likely he will be upset at someone who acts as a witness against him for a crime. He feels so strongly that an individual should not act as a witness for police, he got permanent additions to his body that support this sentiment. Display of Defendant's tattoos at trial is relevant toward his intent to commit obstruction of justice.

Prejudice

The Court agrees with Defendant that physically displaying his tattoos to a jury is unnecessary and overly prejudicial. *See* Def. Opp. at 9-10. Defendant points out he has other tattoos which may prejudice the jury; for example, Defendant has a tattoo of a firearm and "phrases ... jurors might consider derogatory." *Id.* at 10 n. 5.

It would be completely inappropriate to force Defendant to take off his shirt and show a jury his tattoos. Defendant standing before a jury, displaying his body in a way that requires removing certain articles of clothing, is so derogatory it may distract the jury from analyzing the tattoos themselves. In addition, unless time is taken to cover up every tattoo that is not discussed in the 2015 interview, there is a danger of prejudicing the jury that outweighs the probative value of physically seeing the tattoos.

An alternative to Defendant physically displaying his tattoos is to show jurors photographs of only the relevant tattoos discussed in the transcript. This would eliminate the possibility of prejudicing jurors by showing them irrelevant but provocative tattoos. The tattoos are probative into Defendant's state of mind and are visual depictions of what was described in

the 2015 interview. Limiting the tattoos shown to the jury to pictures of specific tattoos Defendant discussed with police in 2015 eliminates the possibility of the jury being prejudiced by other tattoos depicting guns or derogatory language, and the distraction of seeing Defendant stand shirtless before the jury. There is the possibility of some prejudice by jurors who may not like tattoos generally, but this danger does not substantially outweigh the tattoos' probative value. Defendant showing photographs of only the tattoos discussed in the 2015 interview is not prohibited by Rule 403.

Fifth Amendment Rights

Even though photographs of Defendant's tattoos are not precluded by either relevance or prejudicial value, the Court will analyze whether showing Defendant's tattoos to the jury is prohibited by the Fifth Amendment. To qualify for Fifth Amendment protection against self-incrimination, a statement by a defendant must be testimonial. *Hiibel*, 542 U.S. at 189. Defendant claims his tattoos are testimonial because the government is relying on them for their content. *See* Def. Opp. at 12-13. The government argues they are not testimonial, because like Defendant's original statements to police, Defendant voluntarily displayed his tattoos in the 2015 interview and therefore cannot be barred from displaying them in court. *See* Gov't Reply at 5-6.

Similar to Defendant's statements about his tattoos, the tattoos themselves also reveal information, and the government is relying on this information to show it is more likely Defendant intended to prevent Ms. Styles from testifying against him. *See* Gov't Mot. at 4. The Second Circuit dealt with a similar issue which, although not binding, assists this Court's analysis. In *United States v. Greer*, it was determined a defendant's tattoos were testimonial for Fifth Amendment purposes because the content of the tattoo, the name "Tangela," was used to prove Defendant had a relationship with a person of the same name, thereby allowing jurors to

conclude Defendant had possession of ammunition at issue in the case. *United States v. Greer*, 631 F.3d 608, 613 (2d Cir. 2011).

Here, Defendant's tattoos are being used to show he has a strong, negative mindset towards people who "snitch" to police, which would allow jurors to conclude Defendant intended to prevent Ms. Styles from testifying. *See* Gov't Mot. at 4. Defendant's physical tattoos are therefore testimonial for Fifth Amendment purposes.

For similar reasons to Defendant's 2015 interview with police, physically displaying his tattoos (or showing photographs) is incriminating. The tattoos are being used to further the government's proposition of Defendant's intent to obstruct justice when he spoke to Ms. Styles.

Finally, the Court will analyze whether showing the jury Defendant's tattoos would be compelled under the Fifth Amendment. Defendant argues because the government does not already have independent knowledge of the tattoos, forcing Defendant to display his tattoos and admit their existence is compelled communication. *See* Def. Opp. at 14-15. The Court disagrees with this argument. In the transcript, the detective asks Defendant to "walk [him] through [Defendant's] tattoos." Gov't Mot. at 5. Defendant proceeds to describe his tattoos and it is clear he is physically showing the detective his tattoos as he does so: "This is a mouth screaming. You see the teeth and all that shit?"; "This is my first tattoo . . . I got this when I was, like, 13." Gov't Mot. at 6, 7. It cannot be said that the government has no actual knowledge of the tattoos because Defendant previously physically showed them to police.

The same logic applies here as it did with Defendant's statements about the meaning of his tattoos. The court in *Greer* discussed that the detective observed the defendant's tattoo at the time of his arrest, and no physical force was needed to see it. *Greer*, 631 F.3d at 613. Here, Defendant had voluntarily showed his tattoos to police. *See* Gov't Mot. at 6-7. The court in

Greer also noted that, like voluntarily prepared documents that are not given Fifth Amendment protection, voluntarily getting a tattoo is not a product of government compulsion. *See Greer*, 631 F.3d at 613. No one forced Defendant to tattoo his views of “snitching” onto his body, nor did anyone force him to show them to police officers. Showing pictures of the tattoos to the jury now cannot be said to be compelled under the Fifth Amendment.

Defendant physically displaying his tattoos are testimonial and incriminating, but not compelled; therefore, the Fifth Amendment does not bar photographs of Defendant’s tattoos from admission. The photographs are limited to those discussed by Defendant in the 2015 interview, and the photographs must not show any other tattoos to avoid prejudicing the jury.

CONCLUSION

For the foregoing reasons, the government’s motion to compel Defendant to display his tattoos at trial is granted.

SO ORDERED.

Applicant Details

First Name **Dylan**
 Middle Initial **S**
 Last Name **Reichman**
 Citizenship Status **U. S. Citizen**
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Applicant Education

BA/BS From **Haverford College in Pennsylvania**
 Date of BA/BS **May 2016**
 JD/LLB From **Georgetown University Law Center**
https://www.nalplawschools.org/employer_profile?FormID=961
 Date of JD/LLB **May 20, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **American Criminal Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
Externships **No**
Post-graduate Judicial
Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

DYLAN S. REICHMAN

126 12th St. NE, Basement, Washington, DC 20002 • (973) 747-5325 • Dsr72@georgetown.edu

March 23, 2023

The Honorable Judge Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Application—2024–2025 Term

Dear Judge Walker:

I am writing to apply for a 2024–2025 term clerkship in your chambers. I am a third-year law student at the Georgetown University Law Center and a member of the Executive Board of the *American Criminal Law Review*. After graduation, I will join WilmerHale as an Associate Attorney in the firm's New York office, where I am excited to develop my skills as a lawyer and grow as a writer and researcher. My experience working to hold the powerful to account and to correct miscarriages of justice through exonerations has led me to admire your career. It would be an honor to continue to learn from you and aid in the adjudication of meaningful cases as your clerk.

I have been fortunate to have had several meaningful professional opportunities, before and during law school, that have strengthened my desire to pursue a clerkship in your chambers. Before law school, I served as a Paralegal in the Philadelphia District Attorney's Office's Conviction Integrity and Special Investigations Unit, where I helped to pursue exonerations and investigate and prosecute police misconduct. There, I learned the value of holding all parties in the legal system to the highest standards and gained a deep understanding of the anatomy of a criminal case from investigation through postconviction litigation. As a Legal Intern at the United States Attorney's Office for the Southern District of New York and a Legal Extern at the Department of Justice's Antitrust Division, I observed and embraced the standards of the rigorous practice of complex, high-stakes litigation in the Southern District and across the country. Finally, my pro bono work during law school has helped to ground me in an understanding of the impacts that the law has on individuals, highlighting the importance of diligence, ethics, and a relentless work ethic as a participant in the system. I am proud to anticipate graduating with Exceptional Pro Bono Recognition honors.

Attached please find my resume, writing sample, law school transcript, and letters of recommendation. In addition, attached is a letter from Assistant Dean Marcia Pennington Shannon providing further information about Georgetown's Curriculum B for first-year students, which I took. Please do not hesitate to contact me should you have any questions regarding my application. Thank you in advance for your consideration of my application.

Sincerely,



Dylan Reichman

DYLAN S. REICHMAN

126 12th St. NE, Basement, Washington, DC 20002 • (973) 747-5325 • Dsr72@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER

Juris Doctor Candidate

Washington, DC

Expected May 2023

GPA: 3.68

Honors: Dean's List, 2021 – 2022 Academic Year; Expected Pro Bono Exceptional Honors

Journal: *American Criminal Law Review*: Managing Editor, *Annual Survey of White Collar Crime*, Member, Executive Board

Activities: Law Fellow; Research Assistant for Professor Michael Cedrone; Law Student Volunteer: Terrance Lewis Liberation Foundation, National Registry of Exonerations, and Neighborhood Legal Services Project

HAVERFORD COLLEGE

Bachelor of Arts in Political Science, *Minor* in Philosophy

Haverford, PA

May 2016

Honors: *Herman M. Somers Prize* for Best Political Science Thesis; Political Science Departmental Honors

Activities: Captain, Haverford College Men's Rugby Team; General Manager, WHRC: Bi-Co College Radio

Thesis: *Affect and the Individual Post-9/11*—Accepted for publication in the *Helvidius Journal for Politics and Society*

EXPERIENCE

WILMER CUTLER PICKERING HALE AND DORR LLP

Associate Attorney

Summer Associate

New York, NY

Expected September 2023

May 2022 – July 2022

- Conducted legal research on class action certification on nationwide consumer antitrust class action case; conducted legal and factual research on state post-conviction exoneration case; wrote memorandum to client on Supreme Court precedent that could bear on forthcoming decision; drafted memoranda to clients regarding changes in abortion law and potential liability; summarized and presented findings regarding recent Supreme Court cases; participated in criminal defense during investigation of client.

UNITED STATES DEPARTMENT OF JUSTICE—ANTITRUST DIVISION

Legal Extern, Washington Criminal II Section

Washington, DC

August 2021 – November 2021

- Conducted legal research, drafted and edited motions, participated in pre-indictment investigation and case strategy.
- Drafted motions *in limine* and conducted research for a ten-codefendant Sherman Act conspiracy trial; conducted legal research on privileges and exceptions; performed legal research regarding the viability of public corruption charges against a target public official.

UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK

Legal Intern, Public Corruption & Money Laundering and Transnational Criminal Enterprises Units

New York, NY

June 2021 – August 2021

- Conducted legal research, drafted and edited briefs, prepared memoranda on legal and investigative strategy, cite-checked pleadings, participated in pre-indictment investigation, aided in case strategy, prepared for and participated in proffer sessions.
- Researched and proposed legal theories supporting honest services fraud and bribery charges in a pre-indictment, multi-target public corruption investigation; drafted a brief in opposition to motion to suppress in a complex wire fraud case; conducted legal research on Sentencing Guidelines and restitution issues in a multimillion-dollar extortion case; proposed theories of liability for a target bank manager in a transnational bank fraud and money laundering investigation.

PHILADELPHIA DISTRICT ATTORNEY'S OFFICE

Legal Intern, Conviction Integrity Unit

Philadelphia, PA

August 2021

- Conducted legal and factual research, drafted direct examination of grand jury witnesses, drafted the grand jury presentment, and planned case strategy for a grand jury investigation resulting in perjury charges against target homicide detectives.

Paralegal, Conviction Integrity & Special Investigations Unit

October 2018 – July 2020

- Conducted legal and factual research, drafted pleadings, reviewed evidence, prepared for grand jury witness examination, participated in strategic planning, produced discovery, coordinated with law enforcement partners, and participated in investigative strategy in prosecutions of police misconduct.
- Participated in investigations of defendants' actual innocence and/or due process violation claims; and made recommendations on the office's positions on exonerations and clemency cases; served as the assigned on a case resulting in an exoneration.

MONTGOMERY MCCracken WALKER & RHODES LLP

Conflicts/Case Intake Specialist

Philadelphia, PA

September 2017 – October 2018

- Ensured compliance with firm policies in case intake and generated conflicts reports.

THE LAW OFFICE OF PETER GOLDBERGER

Paralegal

Ardmore, PA

June 2016 – June 2017

- Copy-edited and cite-checked pleadings, engaged in legal research, and conducted client communications for federal criminal appeals and habeas litigation.

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Dylan S. Reichman
GUID: 828499273

Course Level: Juris Doctor

Entering Program:

Georgetown University Law Center
Juris Doctor
Major: Law

Subj Crs Sec Title Crd Grd Pts R

----- Fall 2020 -----
LAWJ 001 31 Legal Process and Society 4.00 A- 14.68

Nan Hunter

LAWJ 002 32 Bargain, Exchange & Liability 6.00 B+ 19.98

Gary Peller
LAWJ 005 31 Legal Practice: Writing and Analysis 2.00 IP 0.00

Michael Cedrone
LAWJ 009 31 Legal Justice Seminar 3.00 B+ 9.99

Kevin Tobia
EHrs QHrs QPts GPA
Current 13.00 13.00 44.65 3.43
Cumulative 13.00 13.00 44.65 3.43

Subj Crs Sec Title Crd Grd Pts R

----- Spring 2021 -----
LAWJ 003 93 Democracy and Coercion 5.00 B+ 16.65

Allegra McLeod
LAWJ 005 31 Legal Practice: Writing and Analysis 4.00 A- 14.68

Michael Cedrone
LAWJ 007 32 Property in Time 4.00 B+ 13.32

Daniel Ernst
LAWJ 008 32 Government Processes 4.00 A- 14.68

Glen Nager
EHrs QHrs QPts GPA
Current 17.00 17.00 59.33 3.49
Annual 30.00 30.00 103.98 3.47
Cumulative 30.00 30.00 103.98 3.47

Subj Crs Sec Title Crd Grd Pts R

----- Fall 2021 -----
LAWJ 121 09 Corporations 4.00 A- 14.68

Donald Langevoort
LAWJ 1491 107 ~Seminar 1.00 A 4.00

Morris Parker
LAWJ 1491 109 ~Fieldwork 3cr 3.00 P 0.00

Morris Parker
LAWJ 1491 15 Externship I Seminar (J.D. Externship Program) NG

Morris Parker

LAWJ 536 17 Legal Writing Seminar: Theory and Practice for Law Fellows 3.00 A 12.00

Diana Donahoe
EHrs QHrs QPts GPA
Current 11.00 8.00 30.68 3.84
Cumulative 41.00 38.00 134.66 3.54

-----Continued on Next Column-----

Subj Crs Sec Title Crd Grd Pts R

----- Spring 2022 -----

LAWJ 165 07 Evidence 4.00 A- 14.68

Mushtaq Gunja
LAWJ 1652 05 Criminal Justice II: Criminal Trials 3.00 A- 11.01

Michael Gottesman
LAWJ 455 01 Federal White Collar Crime 4.00 A- 14.68

Julie O'Sullivan
LAWJ 536 17 Legal Writing Seminar: Theory and Practice for Law Fellows 3.00 A 12.00

Michael Cedrone
Dean's List 2021-2022

EHrs QHrs QPts GPA
Current 14.00 14.00 52.37 3.74
Annual 25.00 22.00 83.05 3.78
Cumulative 55.00 52.00 187.03 3.60

Subj Crs Sec Title Crd Grd Pts R

----- Fall 2022 -----

LAWJ 1167 05 Anatomy of a Federal Criminal Trial: The Prosecution and Defense Perspective 2.00 A 8.00

Jonathan Lopez
LAWJ 1527 05 Habeas Corpus Post Conviction Practicum 5.00 A+ 21.65

Christina Mathieson
LAWJ 1782 05 Statutory Interpretation Theory Seminar 3.00 A- 11.01

Anita Krishnakumar

LAWJ 215 08 Constitutional Law II: Individual Rights and Liberties 4.00 A 16.00

Gary Peller
LAWJ 361 03 Professional Responsibility 2.00 B+ 6.66

Stuart Teicher

EHrs QHrs QPts GPA
Current 16.00 16.00 63.32 3.96
Cumulative 71.00 68.00 250.35 3.68

Subj Crs Sec Title Crd Grd Pts R

----- Spring 2023 -----

LAWJ 610 20 Week One Teaching Fellows (Internal Investigation Simulation: Evaluating Corruption in Corp Tran) 1.00 P 0.00

In Progress:

LAWJ 1245 09 Trial Practice and Applied Evidence 3.00 In Progress

LAWJ 178 05 Federal Courts and the Federal System 3.00 In Progress

LAWJ 309 08 Congressional Investigations Seminar 2.00 In Progress

LAWJ 3130 09 Investigating Transnational Criminal Organizations & National Security Threats in Cyberspace 2.00 In Progress

LAWJ 317 09 Negotiations Seminar 3.00 In Progress

-----Continued on Next Page-----

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Dylan S. Reichman
GUID: 828499273

----- Transcript Totals -----				
	EHrs	QHrs	QPts	GPA
Current	1.00	0.00	0.00	0.00
Annual	17.00	16.00	63.32	3.96
Cumulative	72.00	68.00	250.35	3.68
----- End of Juris Doctor Record -----				

Unofficial

March 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Dylan Reichman for a clerkship position in Your Honor's chambers. I was one of Dylan's two mentors during his internship at the U.S. Attorney's Office in the Southern District of New York in 2021. To say that Dylan exceeded my expectations would be a gross understatement. He blew me away with the quality of his work, his dedication to public service, and his eagerness to learn. I have no doubt that he will thrive as a clerk.

I cannot briefly summarize the many contributions Dylan made during his internship, so I will focus on one noteworthy example. Dylan provided tremendous assistance on a bribery case involving high-ranking current and former federal agents. Dylan's experience in the Philadelphia District Attorney's Office, where he investigated police misconduct, clearly prepared him for this case. Not only did he grasp the facts and the legal issues almost immediately, he so completely lost himself in the assignments that at one point I gently encouraged him not to spend so many late nights on these assignments. His primary project was drafting sections of our prosecution recommendation. Dylan focused on the complex legal issues attending our case, including recent Supreme Court decisions narrowing the scope of public corruption prosecutions. His writing and analysis could have come from an AUSA. Most impressively, Dylan, without any handholding from me, scoured the record for evidence to support our charging theory and found financial evidence that strengthened our case. That ability to home in on the heart of a case is rare for a new AUSA, let alone a law student. Dylan's work went straight into my final prosecution recommendation with little editing and was instrumental in obtaining approval to charge the case.

For most interns, that work alone would set them apart from the typical law student. For Dylan, it was just one of many projects he completed during the summer. He helped me draft sections of an opposition to pretrial motions in a high-profile fraud case. Once again, he quickly produced work that we could seamlessly integrate into the final version. I know that Dylan completed a number of similar assignments for his other summer mentor. Even that was not enough for Dylan, however. He sought out additional work from other prosecutors, giving him the chance to see the work of other units and learn about other areas of law. I doubt there has ever been a more productive summer intern.

Dylan's prodigious work ethic comes from a sincere desire to use his talents and his energy to do good. Dylan and I had many conversations about the important role of lawyers in strengthening the rule of law, fostering ethical norms, and creating a more just society. He has seen the best and worst of law enforcement and despite that (or because of it), carries a passion for and optimism about serving the public the right way. I felt better about the work I did when I did it with Dylan. I am sure you will feel the same way too.

For these reasons and more, I offer my strongest recommendation for Dylan. If you have any other questions, I hope you will call me without hesitation.

Very truly yours,

Sheb Swett
Assistant United States Attorney
(212) 637-6522
sebastian.swett@usdoj.gov

Sheb Swett - sebastian.swett@usdoj.gov - (646) 832-8041

March 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Dylan Reichman for a clerkship position in Your Honor's chambers. I was Dylan's supervisor when he was a paralegal at the Philadelphia District Attorney's Office's ("DAO") Conviction Integrity and Special Investigations Unit ("CISIU") from October 2018 to July 2020. Since then, Dylan and I have worked on several projects together and speak regularly about his ambitions and the law in general. I have come to know Dylan closely over the last four years—both as his supervisor and as he has grown as a law student. I have no doubt that he will thrive as a clerk.

At the CISIU and in our subsequent collaborations, I have witnessed Dylan tackle everything from legal research and writing projects to complex trial preparation in several high-profile prosecutions. However, before providing particulars regarding my professional relationship with Dylan, I want to first speak about his character. When he requested a one-year postponement of his admission to law school to fulfill commitments at the DAO and further his mission of improving the criminal legal system, I knew I was dealing with a young man who was not only mature beyond his years, but also loyal, determined, compassionate, and intellectually curious. Coupling those character traits with his work ethic means that working with him, no matter the capacity, is like working with a highly respected, successful, and seasoned attorney. While his plate is always full, Dylan never fails to consistently produce extraordinary work product.

After losing Dylan to law school, in a novel turn of events in the summer of 2021, I invited Dylan to return to the DAO as a law student intern to assist me with the investigation and prosecution of three former homicide detectives for their involvement in a wrongful conviction. Although our work in the matter dated back to Dylan's tenure as a paralegal, we found ourselves faced with a looming statute of limitations issue during an unprecedented pandemic which required us to quickly develop and oversee a complex grand jury investigation. After approximately just four weeks, that investigation culminated in historic charges against all three detectives. Dylan's hard work during that time encompassed everything from legal analysis to preparing direct examination of witnesses to drafting the grand jury's presentment. Dylan's efforts in that high-stakes environment were indispensable—but for his hard work and dedication, it is likely the statute of limitations would have run before charges could be filed.

I left the DAO at the end of 2021 and became the Executive Director of the National Registry of Exonerations in 2022. Fortunately, in my new role, I once again persuaded Dylan to volunteer his time to help reform the criminal legal system—only this time our combined efforts at the Registry were more broadly focused on providing comprehensive information on exonerations of innocent criminal defendants to prevent future false convictions.

My personal and professional relationship with Dylan continues to this day; I recently enlisted him to work with me on a project for the American Bar Association, and we speak regularly about life and the law. During more than one conversation I have had with Dylan, I have expressed my personal hope that he will continue to do public interest work. The qualities he possesses—kindness, thoughtfulness, and intelligence, just to name a few—are the qualities we need to see more often in lawyers, particularly lawyers committed to advancing the greater good.

It is without hesitation that I offer my strongest recommendation for Dylan. Please feel free to contact me if you have any questions or if you need additional information.

Sincerely,

Patricia Cummings, Esq.
Former Supervisor,
Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
pcummingslaw@gmail.com
(512) 789-6789

Patricia Cummings - pcummingslaw@gmail.com

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 23, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to strongly recommend Mr. Dylan Reichman for a clerkship in your chambers. Mr. Reichman is an exceptionally bright, focused, and dedicated person who has applied himself wholeheartedly in my courses and at Georgetown generally. He is academically accomplished in his law school class, with a 3.6 GPA, and he will make an outstanding law clerk and lawyer. From the first semester I taught Mr. Reichman, I recognized that he balances superb intellect, drive, and caring humanity. I excitedly hired him as a TA; I would enthusiastically recommend him as a law clerk. He will be a real asset in chambers.

During the eventful 2020-21 academic year, Mr. Reichman was a student in my first-year legal research and writing course. Unfortunately, due to the pandemic, classes met on Zoom all year long. Even in that online setting, Mr. Reichman made a strong impression. He came to class prepared and made incisive and thoughtful comments on a regular basis. Further, even through Zoom, it was apparent he is uncommonly dedicated and caring. Mr. Reichman had worked as a paralegal at the Philadelphia District Attorney's office. In addition to consulting me about the memos and briefs he wrote for my class, he reached out to ask my advice about legal issues that grew out of his work in the DA's office when they reached out to him. I was impressed by his thoughtfulness and by the legal creativity and acumen of his suggestions. Yet, I also found him easy to coach. As a first-year law student, some of his ideas had more merit than others. He eagerly sought my guidance and that of his supervisors to be sure that his analysis and recommendations on various matters was strong. It is only very rarely that students have drawn me into their outside legal volunteerism; I am impressed when it happens.

Mr. Reichman's academic work in my class merited a grade of A-, putting him in the top quarter of students in the course. I regularly used his work as samples in class discussion. His assignments were regularly well-researched and well-reasoned. Further, he met with both his teaching assistant and me to get extra feedback on assignments. Mr. Reichman's tenacity impressed me. He continued to work on documents and went beyond my suggestions in his efforts to improve them. I believe he succeeded and would take that same approach to any assignment you give him.

I was so impressed with Mr. Reichman's abilities that I hired him to serve as one of seven Law Fellows who assisted me in teaching the course to evening students during the 2021-2022 academic year. Law Fellows for the legal writing program at Georgetown are selected through a highly competitive process that includes personal interviews and submission of a writing sample, personal statement, recommendations, and transcript. I can assure you that Mr. Reichman was one of the top candidates in a quite strong pool of some 180 applicants.

As a Law Fellow, Mr. Reichman participated with his colleagues in a weekly, two-hour seminar course during which we analyzed legal issues relating to the first-year students' assignments and discussed commenting and conferencing techniques. Mr. Reichman's contributions to this seminar class were most valuable. He easily masters large bodies of case law, and his colleagues and students benefited tremendously from his command of the law. Further, without prodding, he offered insights into his students' learning that aided me in calibrating the focus of my classroom teaching.

Mr. Reichman also wrote a bench memorandum examining whether a prison violated the First Amendment rights of a prisoner by denying her a written publication and access to a live-stream of her son's high school graduation. Mr. Reichman's memo was appropriately framed around the factors laid out in *Turner v. Safely*. It reflected creative thought about the strongest arguments for both parties. I believe a judge who read that memo would be well-prepared for oral arguments and would have the beginnings of a solid opinion deciding the matter.

As a part of his Law Fellow duties, Mr. Reichman provided detailed comments to eight of my first year students on each of their written assignments and held individual conferences with those students three times in the course of the academic year. For many of the assignments, two drafts were required of the students, each of which received extensive comments from the Law Fellows. I closely supervise comments, reading the first year student's work and revising the Law Fellow comments on it. Mr. Reichman's well-written and highly detailed comments explained his students' analytical weaknesses, logical leaps, and research gaps in clear yet supportive language. Mr. Reichman routinely identified several possible solutions for shortcomings, enabling the student writers to become independent decision-makers.

Mr. Reichman's many responsibilities as a Law Fellow required a strong work ethic. Commenting on first year students' memos and briefs is a labor-intensive task. I relied upon Mr. Reichman to send comments to me early in the process and to work steadily until he finished—often ahead of my deadlines. Given the many commitments he balanced as a second-year law

Michael Cedrone - mjc27@law.georgetown.edu - (202) 662-9568

student, this accomplishment alone was particularly impressive. More impressive yet is the fact that he communicated with me in a timely, professional, and courteous manner about how he planned to complete his work. I expect that Law Fellows will balance multiple demands. Mr. Reichman's strong communication skills and his professionalism set him apart even in this highly successful group.

As a Professor, I enjoyed full confidence in Mr. Reichman's abilities all year and relied on his exceptional judgment. His advice to our students was always on-target. On those few occasions when he was unsure how to respond, he wisely chose to consult me first. Mr. Reichman understood well the position of a Law Fellow: he respected my role as Professor and yet demonstrated appropriate independence and initiative in his role.

As you might surmise, Mr. Reichman is a student whose personal habits bear the hallmarks of a professional. Not only is he diligent in completing assigned tasks, he is also willing to help out on issues that are not strictly his responsibility when there is need or when he has expertise that is particularly valuable.

I will add that Mr. Reichman has shared personal challenges with me that occurred during his Law Fellow year. While I do not wish to detail the specific nature of the challenges he confided to me, I will say that, first, his courageous honesty in addressing these challenges impresses me deeply and, second, that these challenges never once resulted in so much as a brief delay in submitting high-quality work, much less any compromise in the quality of his work.

Mr. Reichman has my highest recommendation, as you can see. He is worthy of your investment, and he will be an excellent clerk. Please do not hesitate to contact me if I can answer any questions.

Sincerely,

Michael J. Cedrone
Professor of Law, Legal Practice

Michael Cedrone - mjc27@law.georgetown.edu - (202) 662-9568

DYLAN S. REICHMAN

126 12th St. NE, Basement, Washington, DC 20002 • (973) 747-5325 • Dsr72@georgetown.edu

WRITING SAMPLE

The following writing sample is an excerpt of a memorandum I prepared as a Legal Intern for the United States Attorney's Office for the Southern District of New York to analyze legal theories supporting charges against two targets, one of whom was a public official. This writing sample omits several sections of the memorandum—including analyses of other potential charges, factual analysis, and information related to the investigation—for the sake of space and to protect confidentiality and grand jury secrecy. I have revised and edited this sample since excerpting it from the original memorandum. AUSA Sheb Swett has approved the use of this writing sample for judicial clerkship applications. AUSA Swett did not edit any of this writing sample.

Dylan Reichman – Writing Sample

You asked me to research legal theories supporting public corruption charges against a target public official and a target civilian (the “targets”). In particular, you asked me to determine whether the targets could be charged with bribery, 18 U.S.C. § 201, under the “stream of benefits” theory. Ultimately, I believe the targets can be charged with violating the “lawful duty” species of bribery, 18 U.S.C. §§ 201(b)(1)(C) & (2)(C), under the “stream of benefits” theory.

I. ELEMENTS OF THE OFFENSE

Bribery of a public official has four elements: 1) giving a thing of value; 2) to a public official; 3) with corrupt intent, in the form of a *quid pro quo* agreement; and 4) to influence an official act, induce the commission of a fraud on the United States, or to induce the official’s violation of a lawful duty. 18 U.S.C. § 201(b); *see also United States v. Valle*, 538 F.3d 341, 344–45 (5th Cir. 2008) (outlining elements of § 201(b)).

A. Thing of Value

i. Generally

A bribe must involve the giving and/or receiving of a “thing of value.” § 201(b). The phrase “thing of value” is construed broadly; any payment or good that the public official subjectively believes has value constitutes a “thing of value.” *See, e.g., United States v. Crozier*, 987 F.2d 893, 901 (2d Cir. 1993). The definition of “thing of value” extends beyond monetary payments. *See United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008) (holding that “monetary worth is not the sole measure of value” in a bribery scheme). Other “things of value” can include “intangibles, such as freedom from jail and greater freedom while on pretrial release,” *United States v. Townsend*, 650 F.3d 1003, 1011 (11th Cir. 2011), or promises of future employment. *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986).

The thing of value need not be conferred directly to the public official; indeed, it can be given to third parties when doing so benefits the public official. *See, e.g., United States v. Demizio*, 741 F.3d 373, 374, 382 (2d Cir. 2014) (kickbacks made to defendant’s brother and father) (collecting cases); *United States v. McDonough*, 56 F.3d 381, 384–85 (2d Cir. 1995) (payment made to company controlled by public official’s wife). It is enough for the jury to conclude that the defendant “benefitted *indirectly* from the payments to [third parties].” *Demizio*, 741 F.3d at 382–83 (emphasis added).

ii. Stream of Benefits/As Opportunities Arise

While bribes are traditionally given either before or after the public official performs an official act, *see, e.g., United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998), the Second Circuit also recognizes a third type of temporal relationship between the bribe and the official act. In this type of relationship, known as the “stream of benefits” or “as opportunities arise” theory, the briber gives the public official things of value periodically as a stream of benefits in exchange for the public official performing beneficial actions on specified matters “as opportunities arise.” *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007) (Sotomayor, J.).

The contours of the theory have evolved over the last fifteen years. *Compare Ganim*, 510 F.3d at 149, with *United States v. Silver*, 948 F.3d 538, 552–53 (2d Cir. 2020), and *United States v. Skelos*, 988 F.3d 645, 656 (2d Cir. 2021). However, in its present formulation, a defendant may

Dylan Reichman – Writing Sample

be convicted under the stream of benefits theory where the government proves beyond a reasonable doubt that the briber and the public official agree that the public official will act on *specific kinds of matters* as the opportunities to do so arise, in exchange for things of value. *Silver*, 538 F.3d at 553. Specific payments need not be linked to specific actions taken by the public official. *Id.* at 553; *Ganim*, 510 F.3d at 144. Further, the types of matters the official will act on need not be precisely defined and the agreement to perform such acts in exchange for the bribe may be proven by circumstantial evidence. *Silver*, 538 F.3d at 557.

Ganim is the seminal stream-of-benefits case in this jurisdiction. There, the Mayor of Bridgeport, Connecticut was convicted of honest services fraud, bribery (under 18 U.S.C. § 666), and bribery conspiracy for awarding contracts to his associates' companies in exchange for a stream of kickbacks. *Id.* at 137–38. On appeal, the defendant argued that the *quid pro quo* for the charged crimes required a direct link between a specific benefit and a specific official act. *Id.* at 142. The court disagreed, instead holding that “the requisite quid pro quo for the crimes at issue may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts *as the opportunities arise*.” *Id.* at 142 (emphasis added). Going further, the court explained that the specific official act need not be identified at the time of the promise. *Id.* at 147. In sum, the court concluded that “bribery can be accomplished through an ongoing course of conduct, so long as evidence shows that the ‘favors and gifts flowing to a public official [are] *in exchange for* a pattern of official actions favorable to the donor.’” *Id.* at 149 (quoting *Jennings*, 160 F.3d at 1014) (emphasis in original).

In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the defendant was charged under the “stream of benefits” theory of bribery, but the Supreme Court did not discuss the validity of that theory in reversing the defendant’s conviction. *See id.* at 2364–65. However, in *United States v. Silver*, 948 F.3d 538 (2d Cir. 2020), the Second Circuit determined that the stream of benefits theory of bribery survived after *McDonnell* but made substantial modifications to the theory. The defendant in *Silver* argued that *McDonnell* invalidated that “as opportunities arise” theory of bribery altogether. *Silver*, 948 F.3d at 552. While the court disagreed, it reinterpreted *Ganim* in light of *McDonnell*’s definition of an “official act” to circumscribe the stream of benefits theory.

Explaining that “*McDonnell* re-emphasizes that the relevant point in time in a *quid pro quo* bribery scheme is *the moment at which the public official accepts the payment*,” *id.* at 556, the court reiterated *Ganim*’s holding that “[t]he ‘as the opportunities arise’ theory of bribery . . . requires a promise to ‘exercise *particular kinds* of influence . . . as *specific opportunities* ar[i]se.”” *Id.* at 553 (emphasis added) (quoting *Ganim*, 510 F.3d at 144).

While affirming that “*Ganim*’s rule that the jury ‘need not find that the specific act to be performed at the time of the promise, nor need it link each specific benefit to a single official act’ remains good law,” *id.* at 568 (quoting *Ganim*, 510 F.3d at 147), *Silver* clarified the stream of benefits theory in two key ways. First, the court emphasized that *McDonnell* does not require the public official, at the time of the promise, to specify the *particular means* by which he will exert his influence, stating “the official need not promise to perform *any precise act* upon the relevant question or matter.” *Id.* (emphasis added).

Second, (and as discussed below) given *McDonnell*’s narrowing of § 201’s definition of an “official act,” *see McDonnell*, 136 S. Ct. at 2371–72, the *Silver* court “also recognized that faithfulness to *McDonnell* requires some limitation on that theory.” *United States v. Skelos*, 988 F.3d 645, 656 (2d Cir. 2021). While the public official need not specify the particular *means* by

Dylan Reichman – Writing Sample

which they will affect a “question, matter, cause, suit, proceeding, or controversy,” after *McDonnell*, the official must, at the time of the *quid pro quo*, “promise to take official action on a particular question or matter as the opportunity to influence that same question or matter arises.” *Silver*, 948 F.3d at 552–53 (emphasis added). That is, the specific *matter* on which the official promises to exert his influence must be identified at the time of the promise under § 201 post-*McDonnell*. Put differently, *Silver* stands for the proposition that under the “stream of benefits” theory, the defendant must specify the type of *ends* sought at the time of the *quid pro quo*, but they need not specify the *means* by which those ends are to be achieved.

The court recognized that participants in bribery schemes often do not make their criminal promises in exacting language and explained that “neither the facts of *McDonnell*, nor the Court’s opinion, suggest that either the payor or the official must precisely define the relevant matter or question upon which the official is expected to exercise his official power. Circumstantial evidence demonstrating an understanding between the payor and the official will often be sufficient for the Government to identify a properly focused and concrete question or matter.” *Id.* at 557 (footnotes omitted). Nonetheless, after *McDonnell*, the government must prove that a particular question or matter was specified at the time of the promise for the “stream of benefits/as opportunities arise” theory of bribery to remain viable.

It is, however, worth noting that *McDonnell*’s holding focused on the definition of an “official act,” which is required to convict under § 201(b)(1)(A) but is *not* required to convict under §§ 201(b)(1)(B) & (C). It, therefore, remains an open question whether a specific “question, matter, cause, suit, proceeding, or controversy” must be identified at the time of the promise for prosecutions under those subsections. While the statute, on its face, suggests that *McDonnell* and *Silver*’s narrowing of the stream of benefits theory only applies to prosecutions under § 201(b)(1)(A), the Supreme Court’s recent trend of narrowing the theories of honest services fraud and bribery out of vagueness concerns may warrant erring on the side of caution. *See, e.g., McDonnell*, 136 S. Ct. at 2373; *Skilling v. United States*, 561 U.S. 358, 404 (2010). Specifying at least the general matter on which a public official promised to act would likely track closely enough to *McDonnell* and *Skilling* to avoid any issues on appeal, even if it may not be required for prosecutions under §§ 201 (b)(1)(B) & (C).

In sum, a defendant may be convicted under the stream of benefits theory where the government proves beyond a reasonable doubt that the briber and the public official agree that the public official will act on *specific kinds of matters* as the opportunities to do so arise, in exchange for things of value. *Silver*, 538 F.3d at 553. Specific payments need not be linked to specific actions taken by the public official. *Id.* at 553; *Ganim*, 510 F.3d at 144. Further, the types of matters the official will act on need not be precisely defined and may be proven by circumstantial evidence. *Silver*, 538 F.3d at 557. These requirements are met in our case, making the “stream of benefits” theory a viable one for prosecuting the targets.

B. Public Official

The bribery statute provides a broad definition of “public official[s]” who fall under its ambit. § 201(a)(1). A wide array of people acting “in any official function” *id.*, may qualify as public officials, as “Congress never intended section 201(a)’s open-ended definition of ‘public official’ to be given [a] cramped reading.” *Dixson v. United States*, 465 U.S. 482, 496 (1984).

Dylan Reichman – Writing Sample

In addition, the public official need not promise to act within the bounds of their specific authority to be found guilty of bribery. *See United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972) (“There is no doubt that federal bribery statutes have been construed to cover any situation in which the advice or recommendation of a Government employee would be influential, irrespective of the employee’s specific authority (or lack of same) to make a binding decision.”).

C. Corrupt Intent—*Quid Pro Quo*

Bribery requires “corrupt intent,” which comes “in the nature of a quid pro quo requirement; that is, there must be ‘a specific intent to give . . . something of value in exchange for an official act.’” *United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002) (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999)). *Quid pro quo* has also been defined, in this jurisdiction, as an “understanding that the payments were made in return for official action,” *United States v. Bruno*, 661 F.3d 733, 744 (2d Cir. 2011) (cleaned up), or as “knowledge of the payor’s expectations.” *Ganim*, 510 F.3d at 149. *See also Silver*, 948 F.3d at 552 (explaining that “bribery criminalizes ‘corrupt promise[s]’—as evidenced by the official’s state of mind—not collusive agreements” (quoting *United States v. Myers*, 692 F.2d 823, 850 (2d Cir. 1982))). In sum, the corrupt intent requirement of bribery requires that there be a *quid pro quo*—an agreement that the public official will perform some official act or fraud, or violate some lawful duty, on a particular matter in exchange for the bribe.

D. Official Act, Fraud, or Lawful Duty

The bribery statute provides that there are three ways a government official and/or those seeking to influence them can violate the statute: 1) by attempting to influence an official act, § 201(b)(2)(A); 2) to induce the commission of a fraud against the United States, § 201(b)(2)(B); and 3) to induce the public official to violate a lawful duty, § 201(b)(2)(C).

i. Influencing an Official Act

a. Definition of Official Act

Section 201(a)(3) defines an “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” In *McDonnell*, Supreme Court set forth the present construction of the phrase. There, the Governor of Virginia received over \$175,000 in gifts, loans, and benefits from a businessman. The indictment alleged that McDonnell committed several official acts in exchange for the bribes: arranging meetings between the businessman and public officials to promote his product, hosting events at the Governor’s mansion to promote the product, contacting other government officials to encourage Virginia state research universities to initiate studies on the product, and recommending government officials meet with the business’ executives. *McDonnell*, 136 S. Ct. at 2365–66.

Turning to the text of § 201(a)(3), the Court began by observing that “[t]he last four words in that list—‘cause,’ ‘suit,’ ‘proceeding,’ and ‘controversy’—*connote a formal exercise of governmental power*, such as a lawsuit, hearing, or administrative determination.” *Id.* at 2368 (emphasis added). Applying the *noscitur a sociis* canon of construction, the Court then reasoned that “question” and “matter” must be “similar in nature” to such formal exercises of governmental power, and held that “[b]ecause a typical meeting, call, or event arranged by a public official is not

Dylan Reichman – Writing Sample

of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a ‘question’ or ‘matter’ under § 201(a)(3).” *Id.* at 2369.

Next, the Court interpreted the words “pending” and “may by law be brought,” holding that those terms “suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete.” *Id.* Further, the Court explained that the phrase “‘may by law be brought’ conveys something within the specific duties of an official’s position—the function conferred by the authority of his office.” *Id.*

Finally, the Court explained that the phrase “any action or decision,” must not be merely “related to a pending question or matter. Instead, something more is required: § 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so.” *Id.* at 2730. The Court’s phrasing suggests that an action or decision *on* a pending matter requires the exercise of discretion on a step involved in that matter. *See also Silver*, 948 F.3d at 568 (holding that public official must agree to “take official action *on a specific and focused question or matter*”).

In sum, an official act under § 201, per *McDonnell*, is defined as:

a decision or action on a “question, matter, cause, suit, proceeding or controversy.” The “question, matter, cause, suit, proceeding or controversy” must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is “pending” or “may by law be brought” before a public official. To qualify as an “official act,” the public official must make a decision or take an action on that “question, matter, cause, suit, proceeding or controversy,” or agree to do so . . . Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of “official act.”

136 S. Ct. at 2371–72.

b. Scope of Official Action

McDonnell’s definition of an official act leaves open the question of how to define the specific duties or functions of a public official. However, courts have historically defined the scope of public officials’ duties broadly, encompassing not only duties listed in statutes or regulations but also those that are customary or prescribed by policy.

For example, in *United States v. Birdsall*, 233 U.S. 223 (1914), the Supreme Court reviewed the bribery convictions of an attorney and two Special Officers of the Interior Department’s Commission of Indian Affairs.¹ *Id.* at 228. The officers, in their capacities at the Commission, were tasked with suppressing “liquor traffic among the Indians,” including by taking “appropriate steps to secure the conviction and punishment of offenders.” *Id.* at 228, 232 (internal citations omitted). Under the legislative scheme at the time, the Commissioner of Indian Affairs

¹ The defendants were convicted of violating § 201’s predecessor statute, *see Birdsall*, 233 U.S. at 227, but the relevant language of that statute is substantially similar to § 201, making *Birdsall* applicable to the analysis in our case. Compare 18 U.S.C. § 201, with Act of Mar. 4, 1909, ch. 321, sec. 117, 35 Stat. 1088, 1109–1110 (1909).

Dylan Reichman – Writing Sample

could recommend leniency for such defendants to the judge presiding over the case, the US Attorney, the Secretary of the Interior, the Attorney General, and the President. *Id.* at 230. Birdsall, the attorney, represented a client convicted of selling liquor to Native Americans and sought the officers’ assistance in obtaining leniency for the client at sentencing. *Id.* at 229–30. The officers were charged with accepting bribes in exchange for agreeing to influence the Commissioner to recommend leniency for Birdsall’s client. *Id.*

The Court reversed the district court’s demurrer of the indictments. *Id.* at 236. In defining what actions fell within the scope of the officers’ official duties, the Court explained that

[t]o constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.

Id. at 230–31 (internal citations omitted).

On this view, the Court defined the officers’ relevant duty as the duty to “give disinterested and honest advice upon the facts known to them with respect to the advisability of showing leniency to convicted violators of the law.” *Id.* at 234. The Court explained that, even though that duty was not specifically promulgated by statute or regulation, the duty was within the scope of their official functions, and therefore reversed the demurrer of the indictments. *Id.* at 231–36.

Over 100 years later, *Birdsall* remains good law. *See, e.g., McDonnell*, 136 S. Ct. at 2371 (“[O]fficial action’ could be established by custom rather than ‘by statute’ or ‘a written rule or regulation,’ and need not be a formal part of an official’s decisionmaking process.” (quoting *Birdsall*, 233 U.S. at 230–31)); *Valdes v. United States*, 475 F.3d 1319, 1323 (D.C. Cir. 2007) (en banc) (noting that *Birdsall* stands for the proposition that the bribery statute’s coverage of official acts can be based on “activities performed as a matter of custom,” not just those specified by positive law); *United States v. Gjeli*, 717 F.2d 968, 977 (6th Cir. 1983) (explaining *Birdsall* held that “lawful duties and official acts extend beyond those imposed by statute to include duties and acts imposed by written rules and regulations”).

As such, in our case, we need not look only to statutes or formal regulations to define the scope of the target public official’s official duties. Instead, custom, written rules, and internal regulations—as well as statutes and formal regulations—combine to shape the scope of the target public official’s “sphere of official conduct.” *Birdsall*, 233 U.S. at 235.

In addition, the bribery statute covers more than that which is within the scope of the payee public official’s official functions. An official act is defined as a matter that may by law be brought “before *any* public official.” 18 U.S.C. § 201(a)(3) (emphasis added). That is, if the bribe is conferred with the intent to influence *any* specific action, even by a third-party public official, it